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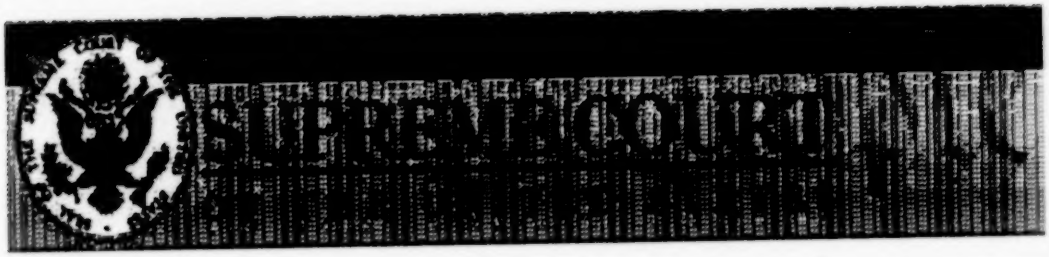

No. 13-1402

Title: John F. Kerry, Secretary of State, et al., Petitioners
v.
Fauzia Din

Docketed: May 27, 2014

Linked with 13A932

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (10-16772)

Decision Date: May 23, 2013

Rehearing Denied: December 24, 2013

Questions Presented

---Date---	------Proceedings and Orders----------
Mar 13 2014	Application (13A932) to extend the time to file a petition for a writ of certiorari from March 24, 2014 to April 23, 2014, submitted to Justice Kennedy.
Mar 20 2014	Application (13A932) granted by Justice Kennedy extending the time to file until April 23, 2014.
Apr 9 2014	Application (13A932) to extend further the time to file a petition for a writ of certiorari from April 23, 2014 to May 23, 2014, submitted to Justice Kennedy.
Apr 10 2014	Application (13A932) granted by Justice Kennedy extending the time to file until May 23, 2014.
May 23 2014	Petition for a writ of certiorari filed. (Response due June 26, 2014)
Jun 17 2014	Order extending time to file response to petition to and including August 11, 2014.
Jul 31 2014	Order further extending time to file response to petition to and including August 25, 2014.
Aug 25 2014	Brief of respondent Fauzia Din in opposition filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Sep 12 2014	Reply of petitioners John F. Kerry, Secretary of State, et al. filed. (Distributed)
Oct 2 2014	Petition GRANTED.
Nov 14 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including November 26, 2014.
Nov 14 2014	The time to file respondent's brief on the merits is extended to and including January 12, 2015.
Nov 26 2014	Joint appendix filed. (Statement of costs filed.)
Nov 26 2014	Brief of petitioners John F. Kerry, Secretary of State, et al. filed.
Dec 22 2014	SET FOR ARGUMENT ON Monday, February 23, 2015
Dec 22 2014	Record requested from U.S.C.A. 9th Circuit.
Dec 22 2014	Record received from U.S.C.A. 9th Circuit is electronic and located on PACER.
Jan 7 2015	CIRCULATED.

Jan 9 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jan 12 2015	Brief of respondent Fauzia Din filed. (Distributed)
Jan 16 2015	Brief amicus curiae of American Civil Liberties Union filed. (Distributed)
Jan 20 2015	Brief amici curiae of Law School Professors filed. (Distributed)
Jan 20 2015	Brief amici curiae of National Immigrant Justice Center, et al. filed. (Distributed)
Jan 20 2015	Brief amici curiae of Former Consular Officers filed. (Distributed)
Jan 20 2015	Brief amicus curiae of California Women's Law Center filed. (Distributed)
Jan 20 2015	Brief amici curiae of National Justice for Our Neighbors, et al. filed. (Distributed)
Feb 11 2015	Reply of petitioners John F. Kerry, Secretary of State, et al. filed. (Distributed)
Feb 20 2015	Letter from counsel for the respondent filed.
Feb 23 2015	Argued. For petitioners: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent: Mark E. Haddad, Los Angeles, Cal.
Jun 15 2015	Judgment VACATED and case REMANDED. Scalia, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Thomas, J., joined. Kennedy, J., filed an opinion concurring in the judgment, in which Alito, J., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAY 23 2014
OFFICE OF THE CLERK

13-1402

No.

In the Supreme Court of the United States

JOHN F. KERRY, ET AL., PETITIONERS

v.

FAUZIA DIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a consular officer's refusal of a visa to a U.S. citizen's alien spouse impinges upon a constitutionally protected interest of the citizen.

2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are John F. Kerry, Secretary of State; Jeh Johnson, Secretary of Homeland Security[1]; Eric H. Holder, Jr., Attorney General; Richard Olson, Ambassador of the United States Embassy, Islamabad, Pakistan; Christopher Richard, Consular General of the Consular Section at the United States Embassy, Islamabad, Pakistan; and James B. Cunningham, Ambassador of the United States Embassy, Kabul, Afghanistan.

Respondent, who was plaintiff in the district court and appellant in the court of appeals, is Fauzia Din.

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[1] At the time the court of appeals issued its judgment, the Secretary of Homeland Security was Janet A. Napolitano.

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In the Supreme Court of the United States

No.

JOHN F. KERRY, ET AL., PETITIONERS

v.

FAUZIA DIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of State and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 718 F.3d 856. The opinion of the district court (App., *infra*, 37a-49a) is not published in the *Federal Supplement* but is available at 2010 WL 2560492.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2013. A timely petition for rehearing en banc was denied on December 24, 2013 (App., *infra*, 50a-51a). On March 20, 2014, Justice Kennedy extended the time within which to file a petition for a

writ of certiorari to and including April 23, 2014. On April 10, 2014, Justice Kennedy further extended the time to and including May 23, 2014. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 52a-71a.

STATEMENT

1. Under the Immigration and Nationality Act of 1952 (INA), as amended, 8 U.S.C. 1101 *et seq.*, an alien may not be admitted to the United States without having applied for and been issued an immigrant or nonimmigrant visa (except in certain circumstances not relevant to this case). 8 U.S.C. 1181(a) (addressing documentation required for immigrants applying for admission to the United States); 8 U.S.C. 1182(a)(7) (describing documentation requirements for nonimmigrants and immigrants seeking admission to the United States). When an alien seeks to obtain an immigrant visa on the basis of a family relationship with a United States citizen or permanent resident alien, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the citizen or permanent resident must first file a petition with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security.[2] If the peti-

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[2] The INA and other laws relating to the immigration and naturalization of aliens are generally administered by the Secretary of Homeland Security, the Attorney General, and the Secretary of State. See 8 U.S.C. 1103, 1104. Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of

tion is approved, the alien may (if all other relevant conditions are satisfied) apply for a visa. See 8 U.S.C. 1154(a)(1) and (b), 1202; 22 C.F.R. 42.31, 42.42.

The decision to grant or deny a visa application rests with a consular officer in the Department of State. See 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.71, 42.81; 8 U.S.C. 1361 (providing that the applicant has the burden of proof to establish eligibility for a visa "to the satisfaction of the consular officer"); see also 6 U.S.C. 236(b)(1) (vesting in the Secretary of Homeland Security "the authority to refuse visas in accordance with law"); 6 U.S.C. 236(c)(1) (reserving the Secretary of State's authority to direct a consular officer to refuse to issue a visa if "such refusal" is "necessary or advisable in the foreign policy or security interests of the United States"). With certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the alien is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 (explaining that "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa").[3]

Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

[3] In addition, the Secretary of Homeland Security may grant a waiver of ineligibility to certain nonimmigrant visa applicants upon recommendation of the Secretary of State or of the consular officer that the alien be admitted temporarily despite his inadmissibility.

Section 1182 identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a). In particular here, Section 1182(a)(3) sets forth "[s]ecurity and related grounds" for visa ineligibility and inadmissibility, including—as described in Section 1182(a)(3)(B)—having engaged in "[t]errorist activities." 8 U.S.C. 1182(a)(3); see also 8 U.S.C. 1182(a)(2) (setting forth "[c]riminal and related grounds" for ineligibility). Such terrorist activities include the knowing provision of material support to a terrorist or terrorist organization; acting as a representative or member of a terrorist organization; endorsing or espousing terrorist activity or persuading others to do so; and receiving military-type training from a terrorist organization. See 8 U.S.C. 1182(a)(3)(B)(i); see also 8 U.S.C. 1182(a)(3)(B)(iii), (iv) and (vi) (defining "terrorist activity," "engage in terrorist activity," and "terrorist organization"). In addition, an alien who is "the spouse or child of an alien who is inadmissible" as a result of terrorist activity that occurred within the last five years is herself inadmissible under Section 1182(a)(3)(B), unless she did not know and should not reasonably have known of the activity or there are reasonable grounds to believe that she has renounced the activity. See 8 U.S.C. 1182(a)(3)(B)(i)(IX) and (ii).

As a general matter, a consular officer who denies an alien's visa application "because the officer deter-

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See 8 U.S.C. 1182(d)(3)(A). Within specified limits, the INA also permits the Secretary of State or the Secretary of Homeland Security, after consultation with the Attorney General, to "determine in such Secretary's sole unreviewable discretion" that certain bars "shall not apply with respect to an alien within [their] scope." 8 U.S.C. 1182(d)(3)(B)(i).

mines the alien to be inadmissible" must "provide the alien with a timely written notice that * * * (A) states the determination and (B) lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1); see 22 C.F.R. 42.81(b). If, however, the consular officer deems the alien inadmissible on "[c]riminal and related grounds" or on "[s]ecurity and related grounds" (which includes "terrorist activity") under 8 U.S.C. 1182(a)(2) or (a)(3), then the statutory written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).

2. This Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization for an alien to challenge the refusal of a visa, the alien cannot assert any right to review. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country," *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1971), and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); see *Mandel*, 408 U.S. at 766 (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (citation omitted); *Fiallo* v. *Bell*, 430 U.S. 787, 792, 794-795 (1977); see also *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999); Richard D. Steel, *Steel on Immigration Law* § 2:11, at 36 (2012 ed.).

No such congressional authorization for review of visa denials exists. Congress has not provided for administrative review of a consular officer's decision to refuse a visa. See 8 U.S.C. 1104(a)(1) (excluding

even from the Secretary of State's authority to administer and enforce the immigration laws the power to review the duties and functions conferred on consular officers, including the grant or refusal of visas); 6 U.S.C. 236(b)(1) (barring Secretary of Homeland Security from "alter[ing] or revers[ing] the decision of a consular officer to refuse a visa"). Congress also has not provided for judicial review of a visa refusal. See, *e.g.*, 6 U.S.C. 236(f) (providing that the designation of authorities in Section 236 does not give rise to a private right of action against a consular officer to challenge a decision to grant or deny a visa); cf. 8 U.S.C. 1201(i) (providing for judicial review of a decision to *revoke* a nonimmigrant visa only in the context of proceedings to remove an alien from the United States); 8 U.S.C. 1252 (discussing judicial review of removal orders).

Accordingly, this Court has not permitted an alien to obtain review of such a decision. On one occasion, this Court did engage in a limited review at the behest of U.S. citizens of a decision by the Attorney General not to exercise his discretion to grant a waiver of the grounds of exclusion that led a consular officer to deny an alien's application for a nonimmigrant visa. See *Mandel*, 408 U.S. at 754, 769-770. In *Mandel*, U.S. citizens asserted that the failure to grant a waiver implicated their interest under the First Amendment in personally hearing an alien Marxist theoretician speak at "discussion forums." *Id.* at 768. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Id.* at 769; see *id.* at 770. Rather, the Court disposed of the case on

the ground that the record in fact included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that Mandel had abused prior waivers by exceeding limitations imposed on his activities in the United States. *Id.* at 769-770. When an alien is excluded from the United States on the basis of the Executive's refusal to exercise its discretionary authority to waive applicable grounds of inadmissibility, the Court explained, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Ibid.* The Court did not address the antecedent non-discretionary decision by the consular officer finding the alien ineligible for a visa based on grounds formulated by Congress. See *ibid.*

3. In 2006, respondent, a naturalized U.S. citizen, married Kanishka Berashk, a native and citizen of Afghanistan who resides in that country. See App., *infra*, 2a-3a, 38a. After the marriage, respondent filed a family-based immigrant visa petition on Berashk's behalf, which USCIS approved. See *id.* at 3a. Berashk then submitted a visa application and appeared at the United States Embassy in Islamabad, Pakistan, for an interview, during which he discussed his employment by the Afghan government while it was under Taliban control. See *ibid.*

In June 2009, a consular officer from the U.S. Embassy in Islamabad denied the visa application. See App., *infra*, 3a. Berashk was informed that the visa refusal was based on his inadmissibility under 8 U.S.C. 1182(a)(3)(B), the provision that covers "[t]errorist activities." See App., *infra*, 4a. In a communi-

cation that cited 8 U.S.C. 1182(b)(3), which makes the requirement of notice of the ground for a visa denial inapplicable to security-based determinations, Berashk was also told that no further explanation was possible. See *ibid.*

4. a. Respondent filed suit in federal district court challenging the denial of Berashk's visa application. She asserted three claims: a claim for a writ of mandamus directing government officials "to adjudicate properly [the] visa application * * * not on the basis of any bad faith or illegitimate reasons"; a claim for a declaratory judgment that 8 U.S.C. 1182(b) is unconstitutional vis-à-vis a U.S. citizen as a violation of procedural due process; and a claim that petitioners had violated the Administrative Procedure Act by arbitrarily misconstruing and misapplying 8 U.S.C. 1182(a)(3)(B). App., *infra*, 5a; 10-cv-533 Docket entry No. (Docket No.) 1, at 10-11 (N.D. Cal. Feb. 5, 2010). Her complaint alleged that "[n]o good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of [the] visa application," because "[t]he fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." Docket No. 1, at 8-10.

The district court granted the government's motion to dismiss. See App., *infra*, 37a-49a. First, the court accepted, based on Ninth Circuit precedent, that respondent adequately alleged a violation of her due process rights by asserting that the government had interfered with a protected liberty interest in her

marriage. See *id.* at 43a-44a (citing *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008)). But second, the court ruled that the consular officer's citation of Section 1182(a)(3)(B) constituted a facially legitimate and bona fide reason for the visa denial. The court explained that under 8 U.S.C. 1182(b)(3) "the government may withhold the specific reasons for the denial for aliens who have been determined to be inadmissible under 8 U.S.C. section 1182(a)(2) or (a)(3)," and noted that respondent had not adequately alleged that the consular officer who denied the visa acted in "bad faith." App., *infra*, 45a-48a. Finally, the court ruled that respondent lacked standing to challenge the constitutionality of the statutory provision that renders the notice requirement inapplicable in the case of an alien found inadmissible on security grounds, because that provision applies "only to the alien and not the United States citizen." *Id.* at 49a.

b. A divided panel of the Ninth Circuit reversed. See App., *infra*, 1a-36a.

As an initial matter, while acknowledging that "[f]ederal courts are generally without power to review the actions of consular officials," the majority concluded that "a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa." App., *infra*, 6a-7a (internal quotation marks, brackets, and citation omitted) (citing *Bustamante*, 531 F.3d at 1062); see *id.* at 7a n.1 (characterizing the interest at stake as "[f]reedom of personal choice in matters of marriage and family life") (internal quotation marks omitted) (brackets in original). The majority characterized that liberty interest as a "more general right" than a possible "liberty interest in the ability to live in the

United States with an alien spouse," which the court said was not the basis for review. *Ibid.*[4]

The majority then concluded that "the reason provided by the consular officials for the denial of Berashk's visa" was not "facially legitimate." App., *infra*, 7a-9a. The majority faulted the government for not giving "any assurance as to what the consular officer believes the alien has done." *Id.* at 9a; see *id.* at 10a (calling for a "reason[] for exclusion that contain[s] some factual elements"); *id.* at 14a ("While the Government need not prove that Berashk performed an activity that renders him inadmissible under the statute, * * * it must at least allege what it believes Berashk did that would render him inadmissible."). The majority also objected to the consular officer's citation to 8 U.S.C. 1182(a)(3)(B) as the basis for inadmissibility, because that provision refers to a number of "different categories of aliens" based on conduct "rang[ing] from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities." App., *infra*, 11a-12a. "[A]t a minimum," the majority concluded, "the Government must cite to a ground narrow enough to allow us to determine that it has been properly construed." *Id.* at 12a (internal quotation marks omitted).

In the majority's view, Section 1182(b)(3), which eliminates the requirement of timely written notice to the alien in the case of a visa denial based on security grounds, made no difference to the analysis. App.,

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[4] The majority also ruled that respondent had standing to challenge the notice rules laid out in 8 U.S.C. 1182(b)(3) "[t]o the extent that the Government relies on" that provision "to interfere with" her due process rights. App., *infra*, 24a.

infra, 15a. The majority reasoned that the exception to a statutory right of notice does not speak to whether "the Government has an absolute right to withhold the information from everyone, including a citizen and this Court." *Id.* at 18a. The majority stated that "nothing in [its] opinion compels dangerous disclosure" that would interfere with the task of barring persons connected with terrorist activities from entering the United States. *Id.* at 20a. According to the majority, "[e]xisting procedures," such as *in camera* disclosures, "are adequate to address * * * national security concerns." *Id.* at 21a.

Judge Clifton dissented. Emphasizing the "highly constrained nature of judicial review of a decision to deny a visa application," App., *infra*, 36a, he deemed the reason given for denial of Berashk's visa facially legitimate because it "was based on a statute" that provided a "lawful" basis for denial, *id.* at 26a (citing 8 U.S.C. 1182(a)(3)(B)). He also relied on the statutory provision under which "the Government does not have to disclose" any "specific information about what lies behind a visa denial" related to terrorist activities, concluding that "compelling [the Government] to disclose the information anyway in order to allow 'limited' and 'highly restrained' judicial review cannot be justified." *Id.* at 32a; see *id.* at 33a-36a (discussing 8 U.S.C. 1182(b)(3)).[5]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit clearly erred in ruling that respondent has a liberty interest in her marriage, protected under the Due Process Clause, that is implicat-

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[5] Judge Clifton also voted to grant the government's petition for en banc rehearing. See App., *infra*, 51a.

ed by denial of a visa to her alien spouse abroad. That ruling directly conflicts with the decisions of numerous other courts of appeals, and could have broad consequences across various areas of immigration law.

The Ninth Circuit also erred in concluding that respondent, as the U.S. citizen spouse of an alien whose visa is denied, has a right to judicial review of the consular officer's decision and to procedural due process in connection with the denial of a visa to the alien. The court then compounded that error by concluding that the government can defend the decision as "facially legitimate" only by providing the specific statutory subsection on which the denial was based and the factual basis for believing that the alien falls within the scope of that subsection. The Constitution confers no such rights, and neither Congress nor this Court has ever authorized such review. In addition, when a visa denial is (as in this case) based on security-related grounds, the review required by the Ninth Circuit conflicts with decisions of this Court and overrides a federal statute intended to protect the confidentiality of intelligence and other sensitive information on which a consular officer may rely in denying a visa to protect the national security. Review by this Court is warranted.

A. This Court's Review Is Warranted To Determine Whether A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

1. This Court's decision in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1971), made clear that a non-resident alien abroad has no constitutional rights in connection with his application for a visa to enter the United States, and therefore no constitutional basis to insist

upon an explanation for the denial of the visa or to obtain judicial review of the denial. See *id.* at 762, 766-768. The court of appeals ruled, however, that respondent, who has no legally cognizable rights under the INA in the issuance of a visa to Berashk, nevertheless is entitled under the Constitution to procedural due process in her own right in connection with the denial of the visa. The court reached that extraordinary result by reasoning that respondent possesses a substantive "protected liberty interest in marriage," derived directly from the Due Process Clause, in connection with her husband's visa application. See App., *infra*, 7a & n.1 (internal quotation marks omitted); see also *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). That ruling is deeply flawed.[6]

To qualify for substantive protection under the Due Process Clause, a liberty interest must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno* v. *Flores*, 507 U.S. 292, 303 (1993) (citation omitted); see *id.* at 302-303 (explaining that "mere novelty" is sufficient to cast doubt on whether an asserted right is a fundamental one); see generally *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 572-575 (1972). In ascertaining whether that test is satisfied, this Court has required "a 'careful description' of the asserted fundamental liberty interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302).

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[6] The Ninth Circuit made the same error in its earlier decision in *Bustamante*—but because the government prevailed in that case on another ground, see 531 F.3d at 1060, it had no opportunity to seek further review of the threshold liberty-interest issue.

This Court has recognized a deeply rooted liberty interest in "rights to marital privacy and to marry and raise a family." *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965); see *Glucksberg*, 521 U.S. at 720 ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry.") (citing *Loving* v. *Virginia*, 388 U.S. 1 (1967)); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-640 (1974) (citing cases regarding the decision to marry and the decision to have children in support of the proposition that the Due Process Clause protects "freedom of personal choice in matters of marriage and family life"); see also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (explaining that a State cannot enter into the private realm of family life so as to make "a crime of a grandmother's choice to live with her grandson"). Those rights are "of similar order and magnitude as the fundamental rights specifically protected" in the Constitution, and therefore themselves qualify as fundamental. *Griswold*, 381 U.S. at 495.

The court of appeals identified no basis for the notion that a person has a comparably fundamental due process interest in connection with the application for a visa to enter the United States filed by her alien spouse, who is subject to the plenary sovereign power of the United States to bar his admission. Perhaps recognizing that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk,[7] the court of appeals seized on lan-

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[7] The consular officer's denial of Berashk's visa application did not interfere with respondent's decision to marry him—their marriage was solemnized years before the denial took place. See

guage from *Cleveland Board of Education* v. *LaFleur*, *supra*—a case involving the decision whether to "bear or beget a child," 414 U.S. at 639 (internal quotation marks omitted)—that refers to "[f]reedom of personal choice in matters of marriage and family life." App., *infra*, 7a & n.1 (quoting 414 U.S. at 640) (internal quotation marks omitted) (brackets in original). As invoked by the court of appeals here, however, that exceedingly general language hardly qualifies as a "careful description" of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse's admission to the United States. *Flores*, 507 U.S. at 302.

In reality, there is only one "choice" of respondent's that is directly affected by the denial of a visa to Berashk: her preference that her alien spouse live with her in the United States. The court of appeals resisted the suggestion that the rights to judicial review and procedural due process it fashioned were "predicated on a liberty interest in the ability to live in

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App., *infra*, 3a. The visa denial did not nullify the marriage, or deprive respondent of its legal benefits, or prevent her from living with her spouse anywhere in the world besides the United States. See *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) ("Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage."), cert. denied, 402 U.S. 983 (1971); *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("[Deportation] would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."), cert. denied, 357 U.S. 928 (1958). Nor did the visa denial prevent respondent from "rais[ing] a family," either in the United States or elsewhere. *Griswold*, 381 U.S. at 495.

the United States with an alien spouse," insisting that a "more general right" was at issue. App., *infra*, 7a n.1. But the court did not explain any basis for that resistance—and, in light of the vagueness of the "more general right" on which it purported to rely and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized, no such basis exists. It is apparent that the "freedom of personal choice" perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. See, *e.g.*, *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("Appellants argue that the due process clause gave her a right, upon marriage, to establish a home, create a family, have the society and devotion of her husband, etc.; and that to deport her husband * * * would unconstitutionally destroy that marital status. But the essence of appellants' claim, when it is analyzed, is a right to live in this country."), cert. denied, 357 U.S. 928 (1958); see also *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971).

There is no history in this Nation of recognizing a constitutionally protected liberty interest in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the spouse from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress's complete discretion, as an exercise of that body's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*,

408 U.S. at 766. For instance, in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), a case involving an attempt by U.S. citizens and lawful permanent residents to obtain visas for alien family members, this Court emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* at 792 & n.4 (internal quotation marks omitted). Significantly, the Court specifically rejected as a "fallacy," contrary to "fundamental principles of sovereignty," the argument that the family-preference visa system gives such "a fundamental right to American citizens"—even while recognizing that "the families of putative immigrants certainly have an interest in their admission." *Id.* at 794-795 & n.6; see also generally *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950)).[8]

The contrary approach adopted by the court of appeals here could have sweeping consequences. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might attempt to assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of a serious crime, or ties to terrorist activity. See 8 U.S.C 1227. Cf. *Payne-Barahona* v. *Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007) ("If there were

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[8] Moreover, as the court below suggested, other courts of appeals have, in decisions stretching back many decades, specifically "repudiated" the existence of a protected liberty interest in living in the United States with an alien spouse (or with other alien relatives). App., *infra*, 7a n.1; see pp. 19-21, *infra*.

such a right, it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service.").

None of those kinds of claims has been given credence by the courts, let alone viewed as implicating a constitutionally protected interest that confers a right to procedural due process and judicial review in connection with the application of the Nation's immigration laws to an alien family member abroad. In ruling otherwise, the Ninth Circuit went seriously astray.[9]

2. The Ninth Circuit's erroneous ruling that respondent has an interest conferred by the Constitution that entitles her to challenge the denial of a visa for her alien spouse is in conflict with the decisions of numerous other courts of appeals.

In *Bangura* v. *Hansen*, 434 F.3d 487 (6th Cir. 2006), the Sixth Circuit reached a result directly contrary to the Ninth Circuit's decision here. *Bangura* involved claims brought by a U.S. citizen and his alien spouse that denial of a visa petition filed on behalf of the spouse violated their due process rights. The court of appeals ruled that the plaintiffs failed to al-

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[9] The Ninth Circuit's error in this regard was also the sole basis for another legal error: its ruling that respondent had standing to challenge 8 U.S.C. 1182(b)(3), the statutory provision lifting in certain circumstances the requirement of a written notice of reasons for a visa denial. See App., *infra*, 22a-24a. The court of appeals said that respondent had standing "[t]o the extent" that the government relied on that provision "to interfere with" a "constitutionally protected due process right to limited judicial review of her husband's visa denial." *Id.* at 24a. Accordingly, a ruling by this Court that the visa denial did not implicate respondent's constitutional rights would also resolve that standing question.

lege a liberty interest that would allow them to state a procedural due process claim. See *id.* at 495-497. The court accepted that plaintiffs "have a fundamental right to marry," but explained that "[a] denial of an immediate relative visa does not infringe upon" that right. *Id.* at 496. The court also concluded that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." *Ibid.* (internal quotation marks omitted) (citing *Almario* v. *Attorney Gen.*, 872 F.2d 147, 151 (6th Cir. 1989)).[10]

In *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the Second Circuit relied on the same principle to reject claims virtually identical to those at issue here: that "the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason * * * and that failure of the Department of State * * * to specify the reasons for denial of the husband's visa application denied him procedural due process." *Id.* at 554-555. The court refused to review the decision to deny the visa application under the rationale of *Mandel*, distin-

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[10] In reliance on *Bangura*, the Third Circuit reached the same result in an unpublished decision. See *Fasano* v. *United States*, 230 Fed. Appx. 239, 239-240 (3d Cir. 2007) (explaining that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country," and affirming dismissal of U.S. citizen's complaint that his civil rights were violated when the government denied his alien spouse a visa) (internal quotation marks omitted); see also *Chiang* v. *Skeirik*, 582 F.3d 238, 242 (1st Cir. 2009) ("There is no authority supporting the view that a United States citizen has a constitutional right to engage in a marriage ceremony in the United States at which the foreign national is present.").

guishing that decision on the ground that "no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated' here." *Id.* at 556-557. In particular, the court explained, the claim that denial of the alien's visa application implicated the constitutional rights of the citizen spouse was "foreclosed" by the principle that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse." *Id.* at 555 (citing, *inter alia*, *Noel* v. *Chapman*, 508 F.2d 1023, 1027-1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975)).

As *Burrafato* indicates, courts of appeals addressing the issue in removal proceedings, as distinguished from proceedings involving denials of visa applications, have also reached the conclusion that no protected liberty interest is implicated by barring a U.S. citizen's alien spouse from being present in the United States. See, *e.g.*, *Garcia* v. *Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982) ("Mrs. Garcia and the children are United States citizens. The deportation order has no legal effect upon them. It does not deprive them of the right to continue to live in the United States, nor does it deprive them of any constitutional rights."); *Silverman*, 437 F.2d at 107 (rejecting argument that "the government's action" in seeking to deport an alien spouse of a U.S. citizen "is destroying [the] marriage"); *Swartz*, 254 F.2d at 339 ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband.").[11] That differing

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[11] Similar decisions in various courts of appeals have rejected the argument that removal of an alien deprives other citizen relatives of constitutional rights. See, *e.g.*, *Oforji* v. *Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (stating in case involving an alien's U.S. citizen children that "[t]he law is clear that citizen family members of

context does not lessen the conflict between the holdings of those cases and the holding of the court below; the question about the existence and status of the relevant liberty interest is the same in both arenas.

In short, numerous decisions from other courts of appeals are irreconcilable with the Ninth Circuit's conclusion that respondent has a fundamental liberty interest implicated by the government's decision to deny her alien spouse a visa for entry into the United States that entitles her to procedural due process in her own right. This Court should grant certiorari to correct the Ninth Circuit's errors and restore nationwide uniformity on this previously settled issue.

B. The Court of Appeals' Imposition Of Judicial Review And Notice Requirements On A Consular Officer's Visa Determination Warrants This Court's Review

1. Even assuming that respondent's own constitutional rights are somehow implicated in this case, the Ninth Circuit decision is wrong. Purporting to apply the statement in *Mandel* that a "facially legitimate" exercise of discretion survives judicial review, the court of appeals authorized a searching inquiry into the reasons for denial of a visa and improperly imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on national security grounds.

a. As an initial matter, *Mandel* did not authorize judicial review of a consular officer's decision to deny a visa, and—contrary to the ruling below, see App.,

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illegal aliens have no cognizable interest in preventing an alien's exclusion and deportation"); see also *Payne-Barahona*, 474 F.3d at 2-4 (collecting cases).

infra, 7 n.1—such a decision is not subject to review under *Mandel*'s rationale.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain review of a discretionary denial by the Attorney General of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application. In that narrow context, the Court examined the reason for the denial of the waiver that appeared in the record and concluded that because that reason was "facially legitimate and bona fide," it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason. See *id.* at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.").

Moreover, a rationale that might support such limited review of a discretionary waiver of a ground of inadmissibility by the Attorney General does not extend to the underlying decision by a consular officer that such a ground applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that an alien is not eligible for a visa must, by definition, be tethered to the legal provisions that define such ineligibility. See, *e.g.*, 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask

if the reasons for visa denial set forth in an Act of Congress are "facially legitimate"; those reasons are legitimate on their face by their very nature, and courts are in no position to second-guess Congress's choices about which aliens should and should not be permitted to enter the United States. See generally *Fiallo*, 430 U.S. at 792-795; *Mandel*, 408 U.S. at 765-767.

Accordingly, extension beyond the discretionary waiver context of the approach in *Mandel*—which, in any event, formed the narrow basis for decision in that case simply because a facially legitimate decision already appeared in the record, and not because the approach was deemed constitutionally mandated—is unwarranted. See *Mandel*, 408 U.S. at 767 ("[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision."). Cf. *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1161-1165 (D.C. Cir. 1999) (placing weight on the distinction between a consular officer's visa denial and the Attorney General's refusal to waive the applicable grounds of inadmissibility). But see *American Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009). Because the decision of a consular officer was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny and insisting upon a further explanation for the visa denial.

b. Beyond that basic flaw at the threshold, moreover, the Ninth Circuit erred in ruling that the government must identify the specific subsection of 8 U.S.C. 1182(a)(3)(B) under which the visa application was denied and the factual basis for the determination

of inadmissibility—and must do so not for the benefit of the alien affected, who has no constitutional rights in connection with his visa application, but for his spouse, who has no legally cognizable interest under the INA in issuance of such a visa. There is no basis in the Constitution to require the government to provide such information, and all the more so in a case involving terrorism-related grounds for refusing to admit the alien into the United States.

Congress recognized the special concerns associated with terrorism-related (and crime-related) reasons for a visa denial in 8 U.S.C. 1182(b)(3), which provides that when such reasons are at issue the consular officer need not furnish the alien with a written notice that states the determination and lists "the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1) and (3).[12] Section 1182(b)(3) reflects Congress's judgment regarding the need for deference to the Executive's national-security determinations, and the real risk that disclosure of the information underlying a visa denial could be harmful to the Nation's security. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened deference to the judgments of the political branches with respect to matters of national security"); see generally *Galvan* v. *Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the

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[12] See also 8 U.S.C. 1202(f) (providing that consular records pertaining to visa decisions "shall be considered confidential" and may "in the discretion of the Secretary of State" be "made available to a court" only in limited circumstances); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 744 (D.C. Cir. 1983) (applying Section 1202(f) to "information revealing the thought-processes of those who rule on the [visa] application").

admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.").

The Ninth Circuit's decision permits an end-run around Congress's considered judgment to permit the Executive to shield information related to visa denials in those circumstances. That result turns on its head the established principle that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see generally *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("when it comes to * * * drawing factual inferences" in the national security context, "'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate") (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981)).

Several decisions of this Court involving provisions similar to Section 1182(b)(3) recognize exactly these concerns. For instance, in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court considered the constitutionality of the exclusion of an alien on security-related grounds. See *id.* at 207. A regulation then in effect provided that the Attorney General could deny a hearing to aliens excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." *Id.* at 211 n.8. The Court emphasized that in an exclusion case Congress dictates the relevant procedures and, "because the action of the executive officer under such authority is final and conclusive,

the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.'" *Id.* at 212 (quoting *Knauff*, 338 U.S. at 543). The Court therefore ruled that "the Attorney General may lawfully exclude respondent without a hearing as authorized by the * * * regulations * * * Nor need he disclose the evidence upon which that determination rests." *Id.* at 214-215; see, *e.g.*, *Knauff*, 338 U.S. at 544 (rejecting challenge by excluded alien spouse of U.S. citizen to regulations under which the Attorney General could deny a hearing to such an alien when he "concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States" and "the disclosure of the information on which he based that opinion would itself endanger the public security"). Surely the holdings of those cases could not be overcome simply by having the excluded alien's spouse request the information. A fortiori that is true with respect to an alien, like Berashk here but unlike the aliens in *Mezei* and *Knauff*, who has not even reached our shores.

The Ninth Circuit's decision also is inconsistent with *Mandel*, the very decision that the court of appeals purported to be following. Emphasizing that a court should not "look behind" a visa-related determination, 408 U.S. at 771, *Mandel* did not require the government to provide a reason for its actions that did not already appear in the record, or engage in anything resembling the type of review that the decision below dictates. The Ninth Circuit has mandated that

the government list a specific statutory subsection governing ineligibility for a visa and specific facts about what the alien did to fall within that subsection, so that a court could test those facts to "verify" that they "constitute a ground for exclusion under the statute." App., *infra*, 12a. That plainly entails "look-[ing] behind" a consular officer's visa-denial decision.

2. In addition to being inconsistent with this Court's precedent, the Ninth Circuit's decision threatens to interfere with U.S. national-security interests in a number of different respects. Such serious adverse consequences counsel strongly in favor of review by this Court.

First, the disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing law-enforcement or national-security investigation. Furnishing such information to the alien or his U.S. citizen spouse could jeopardize the public safety or the safety of individual operatives in the field by revealing information specific to the alien or classified sources and methods more generally. It is for these reasons—to protect the government's ability to keep confidential information about security- or crime-related investigations from targets or their associates and to protect law-enforcement and intelligence sources and methods—that Congress authorized consular officers to withhold notice of the ground for a visa denial in the first place. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (providing that visa records shall be considered confidential); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 55 (1952) (House Report) (describing "infor-

mation of a confidential nature" as being information "the disclosure of which would be prejudicial to the interests of the United States").

Those concerns do not arise only from the Ninth Circuit's requirement that the government disclose "facts" about "what the consular officer believes the alien has done," App., *infra*, 9a, 14a; they are also relevant to that court's insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see App., *infra*, 12a, 14a. For example, the government's disclosure to a U.S. citizen that it has reason to believe that his or her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make educated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, and relatedly, the Ninth Circuit's decision, if allowed to stand, could have a chilling effect on the sharing of national security information among federal agencies and between the United States and foreign countries. When making visa ineligibility determinations, consular officers rely largely on information that other agencies or entities provide to the Department of State. See 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Gov-

ernment for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); see also, *e.g.*, House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States"). If the Department of State were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, consular officers may not receive or be permitted to rely upon the complete information needed to protect the national security. See, *e.g.*, National Commission on Terrorist Attacks Upon the United States, *9/11 Commission Report* 384 (2004) ("For terrorists, travel documents are as important as weapons.").

The Ninth Circuit suggested that any harm to the United States could be ameliorated by providing information about the reasons for a visa denial to a district court *in camera* "if necessary." App., *infra*, 21a. But that proposed solution does not respect the sovereign power of the United States to bar the admission of aliens on security grounds, and does not adequately safeguard the political Branches' ability to make visa decisions in the interest of national security. The panel's ruling is vague about exactly what "procedures" should be followed and under what circumstances, *ibid.*, and courts have sometimes been reluctant to "dispose of the merits of a case on the

basis of *ex parte, in camera* submissions." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987); see, *e.g.*, *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (rejecting the government's attempt to use *ex parte* information in the context of a visa application case), vacated on jurisdictional grounds, 525 U.S. 471 (1999). But see, *e.g.*, *Jifry* v. *FAA*, 370 F.3d 1174, 1180-1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005). Moreover, any widening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure. The Ninth Circuit's imposition of a regime of judicial review of terrorism-related grounds for barring an alien from the United States is therefore likely to disrupt the government's efforts to safeguard national security and public safety.

3. The difficulties raised by the Ninth Circuit's decision could affect a significant number of visa applications every year. According to the Department of State, between January 1, 2012, and December 31, 2012, consular officers denied 226,761 visa applications under 8 U.S.C. 1182(a), of which approximately 1400 were filed by aliens on the basis of their engagement or marriage to a U.S. citizen and were denied on Section 1182(a)(2) or (3) grounds. While some of those denials do not involve sensitive criminal or national security grounds, a meaningful number of them would.

For these reasons, and because of the serious errors in the Ninth Circuit's decision and the conflicts it creates with decisions of this Court and other courts of appeals, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16772

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

JOHN F. KERRY,* SECRETARY OF STATE; JANET A. NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL, ATTORNEY GENERAL OF THE UNITED STATES; RICHARD OLSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; CHRISTOPHER RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; JAMES B. CUNNINGHAM, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN, DEFENDANTS-APPELLEES

Argued and Submitted: July 18, 2012
Filed: May 23, 2013

OPINION

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* John F. Kerry, Richard Olson, and James B. Cunningham are substituted for their predecessors pursuant to Fed. R. App. P. 43(c)(2).

Before: RICHARD R. CLIFTON and MARY H. MURGUIA, Circuit Judges, and RANER C. COLLINS, District Judge.**

MURGUIA, Circuit Judge:

United States citizen Fauzia Din filed a visa petition on behalf of her husband Kanishka Berashk, a citizen and resident of Afghanistan. Nine months later, the visa was denied. Consular officials informed Din and Berashk only that the visa had been denied under 8 U.S.C. § 1182(a)(3)(B), a broad provision that excludes aliens on a variety of terrorism-related grounds. The district court granted the Government's motion to dismiss on the basis of consular nonreviewability, concluding that the Government put forth a facially legitimate and bona fide reason for the visa denial, in accordance with *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008). We disagree. Because the Government has not put forth a facially legitimate reason to deny Berashk's visa, we reverse and remand for further proceedings.

I. Background

The following facts are taken from Din's complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (accepting "all factual allegations in the complaint as true" when reviewing an order granting a motion to dismiss). From 1992 to 2003, Din's husband, Berashk, worked as a payroll clerk for the Afghan Ministry of Social Welfare. Since the Taliban controlled Afghani-

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** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

stan from 1996 to 2001, Berashk's employment necessarily included work for the Taliban government. Since 2003, Berashk has worked as a clerk in the Afghan Ministry of Education, where he performs low-level administrative duties, including processing paperwork.

In September 2006, Din and Berashk married. In October of the same year, Din filed a visa petition on Berashk's behalf. On February 12, 2008, United States Citizenship and Immigration Services ("USCIS") notified Din that the visa petition was approved. Several months later, the National Visa Center informed Din that it completed processing the visa and scheduled a visa interview for Berashk at the Embassy in Islamabad, Pakistan. The interview took place as scheduled on September 9, 2008. Berashk answered all questions truthfully, including inquiries about his work for the Afghan Ministry of Social Welfare during the period of Taliban control and about the difficulty of life under that regime. The interviewing consular officer told Berashk he should expect to receive his visa in two to six weeks. The officer gave Berashk a form to submit at the Kabul Embassy, which he submitted with his passport upon returning to Afghanistan.

Almost nine months later, on June 7, 2009, following several phone calls to the Embassy from both Din and Berashk, Berashk received a Form 194 letter informing him that his visa had been denied under Section 212(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a). The letter also stated that there was "no possibility of a waiver of this ineligibility." On July 11, 2009, Berashk sent an email to the Islamabad Embassy

requesting clarification as to the reason his visa had been denied. On July 13, 2009, the Embassy emailed a response, stating the visa had been denied under INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), a section of the INA that lists a wide variety of conduct that renders an alien inadmissible due to "terrorist activities." The email added that "[i]t is not possible to provide a detailed explanation of the reasons for the denial," citing INA § 212(b)(2), 8 U.S.C. §§ 1182(b)(2)-(3), which makes inapplicable the requirement that the aliens receive notice of the reason for denials involving criminal or terrorist activity.

Din then obtained pro bono counsel and made several inquiries about the visa denial. Din's counsel sent a letter to the Immigrant Visa Unit of the Islamabad Embassy requesting reconsideration, or, alternatively, a statement of facts in support of the Government's position that Berashk was inadmissible. The Embassy responded with an email again referring only to INA § 212(a)(3)(B). Counsel subsequently sent a similar letter to the Office of Visa Services at the State Department. Following several other unsuccessful attempts to contact different State Department officials, counsel received an additional email again stating that the visa had been denied under Section 212(a)(3) and that a more detailed explanation for the refusal was not possible.

In late 2009, Din attempted to obtain answers directly by traveling from the United States to the Kabul Embassy and then the Islamabad Embassy. Officials at both embassies declined to provide her with a more specific explanation of the visa denial.

Din then initiated this action, asserting three claims for relief: (1) a writ of mandamus directing defendants to lawfully adjudicate Berashk's visa application; (2) a declaratory judgment that 8 U.S.C. § 1182(b)(3), waiving the visa denial notice provisions for aliens deemed inadmissible under terrorism grounds, is unconstitutional as applied to Din; and (3) a declaratory judgment that defendants are in violation of the Administrative Procedure Act. The district court granted the Government's motion to dismiss, concluding that Din failed to state a claim because the doctrine of consular nonreviewability barred adjudication of her first and third claims. The district court also dismissed Din's second claim, concluding that Din did not have standing to challenge the visa denial notice provision.

II. Standard of Review

We review de novo the district court's order granting a motion to dismiss. *Knievel*, 393 F.3d at 1072. When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Id.* To survive dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

III. Discussion

A. Consular nonreviewability and the *Mandel* exception

We begin with the doctrine of consular nonreviewability. An alien has "no constitutional right of entry" to the United States. *Kleindienst v. Mandel*, 408 U.S.

753, 762, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972). The Supreme Court "without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Id.* at 766, 92 S. Ct. 2576 (quoting *Boutilier v. INS*, 387 U.S. 118, 123, 87 S. Ct. 1563, 18 L. Ed. 2d 661 (1967)). Accordingly, "[f]ederal courts are generally without power to review the actions of consular officials." *Rivas v. Napolitano*, 677 F.3d 849, 850 (9th Cir. 2012) (citing *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986)).

However, we have recognized a limited exception to the doctrine of consular nonreviewability. When the denial of a visa implicates the constitutional rights of an American citizen, we exercise "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason." *Bustamante*, 531 F.3d at 1060. This right to review arises from the Supreme Court's holding in *Mandel*, in which U.S. citizen professors asserted a First Amendment right to "receive information and ideas" from an alien. 408 U.S. at 770, 92 S. Ct. 2576. The *Mandel* Court held that when the Government denies admission "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 762, 92 S. Ct. 2576. Since *Mandel*, our Court and several of our sister circuits have exercised jurisdiction over citizens' challenges to

visa denials that implicate the citizens' constitutional rights. *Bustamante*, 531 F.3d at 1059; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009); *Adams v. Baker*, 909 F.2d 643, 647-48 (1st Cir. 1990); *Abourezk v. Reagan*, 785 F.2d 1043, 1075 (D.C. Cir. 1986). Courts review the denials for "a facially legitimate and bona fide reason." *Bustamante*, 531 F.3d at 1062.

In *Bustamante*, we recognized that a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa. 531 F.3d at 1062.[1] We therefore consider whether the

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[1] The Government's contention that *Bustamante* is not good law is meritless. First, the Government argues that the text of the INA, as supported by its legislative history, precludes judicial review of consular decisions. This argument is irrelevant to the holding of *Bustamante*, which conditions judicial review on the constitutional rights of citizens, not an interpretation of immigration statutes. *See* 531 F.3d at 1062 ("Presented with a procedural due process claim by a U.S. citizen, we therefore consider the Consulate's explanation for the denial of [the] visa application pursuant to the limited inquiry authorized by *Mandel*."). Second, according to the Government, *Bustamante* is predicated on a liberty interest in the ability to live in the United States with an alien spouse, and because this right has been elsewhere repudiated, *Bustamante* is in conflict with Circuit precedent and should not be followed. The Government misreads *Bustamante*; nowhere does the case mention the right of an alien spouse to live in the United States. Rather, it explains that a citizen spouse's right to judicial review is based on the more general right to "[f]reedom of personal choice in matters of marriage and family life." *Id.* We have neither the power to, nor the interest in questioning *Bustamante*'s authority. *See Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984) (only en banc decisions, Supreme Court deci-

reason provided by the consular officials for the denial of Berashk's visa is "facially legitimate and bona fide." *Id.* This inquiry is extremely narrow. Once the Government offers a facially legitimate and bona fide reason for the denial, courts "have no authority or jurisdiction to go behind the facial reason to determine whether it is accurate." *Chiang v. Skeirik*, 582 F.3d 238, 243 (1st Cir. 2009).

There is little guidance on the application of the "facially legitimate and bona fide" standard. *See Marczak v. Greene*, 971 F.2d 510, 517 (10th Cir. 1992) ("Because the 'facially legitimate and bona fide' standard is used relatively infrequently, its meaning is elusive.") (quoting *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990)).[2] We agree with the Second Circuit that "the identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason." *Am. Acad.*, 573 F.3d at 126 (quoting 8 U.S.C. § 1201(g)). This is consistent with *Bustamante*, in which we stated that the

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sions, or subsequent legislation overrule the decisions of prior panels).

[2] The dearth of cases explaining the "facially legitimate and bona fide" requirement explains why we, and the dissent, cannot cite any authority conclusively resolving whether the Government's rationale is sufficiently detailed to constitute a "facially legitimate" basis. *See* Dissent at 869-70 (asserting, without citation, that "[t]here is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application").

visa applicant "was denied a visa on the grounds that the Consulate 'had reason to believe' that he was a controlled substance trafficker." 531 F.3d at 1062.

Accordingly, we must determine if the Government's citation to a broad section of the INA that contains numerous categories of proscribed conduct, without any assurance as to what the consular officer believes the alien has done, is also a facially legitimate reason. Because we conclude that the Government's position would eliminate the limited judicial review established by the Supreme Court in *Mandel* and recognized by this Court in *Bustamante*, and we find no authority to support eliminating this review, we conclude that it is not.

The first problem is that the Government has offered no reason at all for denying Berashk's visa; it simply points to a statute. While the statute might demonstrate that a particular reason is legitimate, in this case there are no factual allegations that would allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied. Din alleges that neither she nor Berashk has any idea what Berashk could have done to be found inadmissible on terrorism grounds, and the Government provides no reason other than its citation to § 1182(a)(3)(B).

In this regard, Din and Berashk's case is distinguishable from *Bustamante* and other visa denial challenges by a citizen. In *Bustamante*, the visa applicant was informed that the consulate had reason to believe he was trafficking illegal drugs and therefore inadmissible, but that the evidence supporting this conclusion

was secret. 531 F.3d at 1060. DEA officials later asked the applicant to become an informant, stating that if he did, his visa problems "would go away." *Id.* at 1061. The applicant refused and his application was denied. In response to an inquiry from counsel for the Bustamantes, the consular official referenced a letter "written by the 'Resident Agent-in-Charge of our local Drug Enforcement Administration Office,' that contained 'derogatory information' to support the finding that there was reason to believe that Jose was a controlled substance trafficker." *Id.* We upheld the visa denial, noting that "the Bustamantes' allegation that Jose was asked to become an informant in exchange for immigration benefits fails to allege bad faith; if anything, it reflects the official's sincere belief that Jose had access to information that would be valuable in the government's effort to combat drug trafficking." *Id.* at 1063.

We specifically held, "Jose [Bustamante] was denied a visa on the grounds that the Consulate 'had reason to believe' that he was a controlled substance trafficker. This is plainly a facially legitimate reason, as it is a statutory basis for inadmissibility. 8 U.S.C. § 1182(a)(2)(C)." 531 F.3d at 1062. The *reason* for exclusion in *Bustamante* was that "the Consulate 'had reason to believe' that he was a controlled substance trafficker." *Id.* The statute gave the reason legitimacy, but the statute standing alone was not the reason.

Other circuits reviewing a citizen's challenge to a visa denial have also relied on reasons for exclusion that contained some factual elements. For example, in

Adams, the First Circuit observed that "[t]he evidence of Adams' involvement in the violent activities of the [Irish Republican Army], both as a policy maker and as a field commander, provides a 'facially legitimate and bona fide reason' for his exclusion." 909 F.2d at 649; *see also Allende v. Shultz*, 845 F.2d 1111, 1120 (1st Cir. 1988) (concluding that the speaking engagements Allende planned for her time in the United States were not a basis for exclusion because 8 U.S.C. § 1182(a)(27), prior to its repeal, excluded aliens seeking to engage in activities that would be harmful to the United States, and required an activity other than speech). The record here is completely void of any similar allegations in support of the Government's denial of Berashk's visa.

The first problem is compounded by the sweeping nature of the cited section of the INA. Section 1182(a)(3)(B) exceeds 1,000 words. It contains ten subsections identifying different categories of aliens who may be inadmissible for terrorism reasons.[3] The section defines "terrorist activities" with reference to six different subsections, containing different kinds

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[3] The subsections cover aliens who: (1) have engaged in terrorist activities; (2) are now or will be engaged in terrorist activities; (3) have incited terrorist activities; (4) are representatives of terrorist organizations or other groups that espouse terrorism; (5) are members of a recognized terrorist organization; (6) are members of an informal terrorist organization; (7) endorse or espouse terrorist activity; (8) have received military-type training from or on behalf of a terrorist organization; (9) are the spouse or child of a person found inadmissible under the subsection; or (10) are officers, officials, representatives, or spokespersons of the Palestinian Liberation Organization. 8 U.S.C. § 1182(a)(3)(B).

of conduct. It defines "engage in terrorist activity" in seven subsections, some of which are divided into further subsections. The conduct described in § 1182(a)(3)(B) ranges from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities. The citation to § 1182(a)(3)(B) contrasts with the much narrower ground of inadmissibility at issue in *Bustamante*.

It appears that, at a minimum, the Government must cite to a ground narrow enough to allow us to determine that it has been "properly construed." *See Am. Acad.*, 573 F.3d at 126 ("[T]he identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason. "). The Government's citation here is so broad that we are unable to determine whether the consular officer "properly construed" the statute. Unlike the dissent, Dissent at 870-71, we are unwilling to assume that the statute has been properly construed without knowing *what* is being construed, let alone *how* it is being construed. By contrast, the Second Circuit analyzed three distinct issues of statutory construction in reviewing a challenge to a visa denial based on § 1182(a)(3)(B)(i)(I), one of the subsections that could be relevant here. *Am. Acad.*, 573 F.3d at 125-35. Given the breadth of the encompassed conduct and the sheer number of grounds of inadmissibility under § 1182(a)(3)(B) it is impossible to know if these, or any

other, issues of statutory interpretation are at issue here.

Additionally, some of the subsections in § 1182(a)(3)(B) confer upon an alien the right to present evidence to rebut the cited reason for inadmissibility. For activity in support of organizations that have not been designated by the Secretary of State as terrorist organizations, an alien may offer "clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization." *See* 8 U.S.C. §§ 1182(a)(3)(B)(i)(VI); 1182(a)(3)(B)(iv)(IV)(cc); 1182(a)(3)(B)(iv)(V)(cc); 1182(a)(3)(B)(iv)(VI)(dd). The Second Circuit read this language to require a consular officer to present the alien with the evidence of inadmissibility and permit him to offer a rebuttal. *Am. Acad.*, 573 F.3d at 131-32. Without knowing the specific subsection applicable to Berashk, we cannot determine whether the consular officer was required to give Berashk an opportunity for rebuttal.

To be clear, we do not "'look behind' exclusion decisions," *Am. Acad.*, 573 F.3d at 137, but we must at least look at them, *see SEC v. Chenery Corp.*, 332 U.S. 194, 197, 67 S. Ct. 1575 (1947) ("We must know what a decision means before the duty becomes ours to" review it.). The Second Circuit, recognizing, as do we, that no evidentiary inquiry is appropriate, explained that "a reviewing court need only satisfy itself that the conduct alleged fits within the statutory provisions relied upon as the reason for the visa denial." *Am. Acad.*, at 134 (concluding that visa applicant's alleged donations to a group that provided material support to terrorists fits

with the statutory basis for denying the visa). Absent evidence of bad faith, we accept the Government's allegations as facts. *Bustamante*, 531 F.3d at 1062-63 ("It is not enough to allege that the consular official's information was incorrect.").

While the Government need not prove that Berashk performed an activity that renders him inadmissible under the statute, *see Adams*, 909 F.2d at 649, it must at least allege what it believes Berashk did that would render him inadmissible. We seek only to verify that the facts asserted by the Government, however bare, constitute a ground for exclusion under the statute. *See Am. Acad.*, 573 F.3d at 126-29 (reviewing whether facts alleged by the Government were grounds for exclusion, but declining to conduct any review of the facts themselves).

The Government's citation to § 1182(a)(3)(B), when combined with its failure to assert *any* facts, is not a facially legitimate ground for denying Berashk's visa. Should we conclude that citation to § 1182(a)(3)(B) is a facially legitimate reason for the denial of Berashk's visa, then citation to § 1182(a), which lists *all* grounds of inadmissibility, would be sufficient. Any judicial review would be wholly perfunctory requiring only that we ensure the Government has properly said nothing more than "8 U.S.C. § 1182(a)." Limited as our review may be, it cannot be that Din's constitutional right to review is a right only to a rubber-stamp on the Government's vague and conclusory assertion of inadmissibility. *Cf. United States v. DeGeorge*, 380 F.3d 1203, 1215 (9th Cir. 2004) (courts should "not simply rub-

berstamp the government's request, but hold the government to its burden").[4]

The dissent does not alleviate our concern that the Government's approach would essentially eliminate all judicial review, even when the constitutional right of a U.S. citizen is implicated. According to the dissent, decisions to exclude aliens are made "exclusively by executive officers, without judicial intervention." Dissent at 871 (quoting *Mandel*, 408 U.S. at 766, 92 S. Ct. 2576). This ignores, of course, that "courts have identified a limited exception to the doctrine where the denial of a visa implicates the constitutional rights of American citizens." *Bustamante*, 531 F.3d at 1061. The dissent's only attempt to give meaning to the exception recognized in *Mandel* and *Bustamante* is to state, "[t]here is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application." Dissent at 869-70. We do not think that even the most limited judicial review is so restrained as to ask only if the Government has successfully provided a citation to the U.S.Code.

We are similarly not persuaded by the argument advanced by the dissent that § 1182(b)(3) supports the Government's position. Dissent at 871-73. Section 1182(b) requires that the consular officer notify aliens if their visa is denied and provide the "specific provision

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While the dissent correctly notes that *DeGeorge* arose in a different context, we do not think that any form of judicial review, whether a product of statute or precedent, should be a rubber-stamp for the Government.

or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1). In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress amended § 1182 and added (b)(3), which states that the disclosure requirement in § 1182(b)(1) does not apply if the alien is inadmissable for a reason stated in § 1182(a)(2) or (a)(3). Pub. L. No. 104-132, § 421, 110 Stat 1214 (1996) (codified at 8 U.S.C. § 1182(b)(3)).[5]

Despite this provision, State Department regulations require consular officers to "inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available," 22 C.F.R. § 42.81(b), and make no exception for denials based on § 1182(a)(2) or (a)(3). As a result, consular officers appear to regularly disclose information to aliens, even if the denial is

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[5] The rationale for this provision was explained by the House Committee on the Judiciary:

> Currently, all foreign nationals who are denied a visa are entitled to notice of the basis for the denial. This creates a difficult situation in those instances where an alien is denied entry on the basis, for example, of being a drug trafficker or a terrorist. Clearly, the information that U.S. government officials are aware of such drug trafficking or terrorist activity would be highly valued by the alien and may hamper further investigation and prosecution of the alien and his or her confederates. An alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege. Thus, there is no constitutional impediment to the limitation on disclosure in this section.

H.R. Rep. 104-383, 102-03 (1995).

based on § 1182(a)(2) or (a)(3). *See, e.g.*, Complaint at 6 (describing email from Islamabad Embassy disclosing statutory basis for Berashk's visa denial); *Bustamante*, 531 F.3d at 1061 (describing letter from Consulate explaining basis for visa denial); *Am. Acad.*, 573 F.3d at 118 (describing telephone call from Government to applicant explaining that visa was denied because the applicant provided material support to a terrorist organization).[6]

According to the dissent, § 1182(b)(3) means that "the Government was not required to provide more specific information regarding" the denial of Berashk's visa. Dissent at 872. This is correct as a matter of statutory interpretation. Under the statutory scheme, aliens have a statutory right to certain information if their visa is denied for most reasons; aliens have no such statutory right if the denial is based on 1182(a)(3) or (a)(2). This lack of an alien's statutory right to information is, however, not helpful in resolving the question we face: whether Berashk's visa was denied for "a facially legitimate and bona fide reason." *Bustaman-*

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[6] The U.S. Department of State Foreign Affairs Manual explicitly recognizes that the statute only establishes the minimum amount of disclosure and states that "although 212(b) also exempts findings of ineligibility under INA 212(a)(2) and (3) from the written notice requirement, we expect that such notices will be provided to the alien in all 212(a)(2) and (3) cases unless: (1) We instruct you not to provide notice; (2) We instruct you to provide a limited legal citation (i.e., restricting the legal grounds of refusal to 212(a)); or (3) You request permission from us not to provide notice." 9 Foreign Affairs Manual 42.81 N2.

te, 531 F.3d at 1060. To make that determination, a court needs some information.

First, the statute simply creates a statutory right to information, and limits the scope of that right. The dissent suggests that because the alien does not have a statutory right to information, by implication, the Government has an absolute right to withhold the information from everyone, including a citizen and this Court. Dissent at 872-73. The dissent cites no authority to support its assertion that an alien's lack of an affirmative statutory right to information functions as an implied prohibition on any disclosure to all people, and we decline to adopt such a position.

While we want to make it emphatically clear that the Government's obligation to provide information in this context is not even remotely close to the Government's obligation under *Brady v. Maryland*, 373 U.S. 83, 91, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), drawing an analogy to *Brady* exposes the fault in the Government's argument. The Jencks Act provides an affirmative statutory right to information and requires the Government to produce "any statement (as hereinafter defined) of the [testifying] witness in the possession of the United States." 18 U.S.C. § 3500. *Brady* requires, at the defendant's request, that the prosecution disclose "[material] evidence favorable to an accused." 373 U.S. at 87, 83 S. Ct. 1194. *Brady* is not limited by the Jencks Act and it "exists as an independent foundation to preserve evidence." *United States v. Bernard*, 623 F.2d 551, 556 (9th Cir. 1979). It would be implausible to suggest that the Government need not disclose *Brady* evidence that is outside the scope of the Jencks At because the

defendant lacks a statutory right to the information. In fact, it is taken for granted that *Brady* material can exist outside the scope of the Jencks Act. *See United States v. Cerna*, 633 F. Supp. 2d 1053, 1056 (N.D. Cal. 2009) (discussing, without controversy, "non-Jencks *Brady* information").

Similarly, the fact that Congress created a limited disclosure obligation in the context of visa denials does not mean that Congress otherwise prohibited the disclosure of all other information. We agree that "[i]t makes no sense to read the statute to *require* disclosure for such denials," dissent at 873 (emphasis added), but we do not read the statute that way. It would also make no sense to read the statute to prohibit the release of any information regarding certain visa denials, because if it did, the executive branch appears to violate the statute regularly. *See, e.g.*, 22 C.F.R. § 42.81(b); Complaint at 6; *Bustamante*, 531 F.3d at 1061; *Am. Acad.*, 573 F.3d at 118. The statute does not compel nor prohibit disclosure in this case.

Second, the dissent's reading of the statute is inconsistent with any concept of judicial review—including the dissent's reading of *Bustamante*. Because of § 1182(b)(3), when a visa denial is based on (a)(2) or (a)(3), the Government is not statutorily required to disclosure "the specific provision or provisions of law under which the alien is inadmissible," 8 U.S.C. § 1182(b)(1)(B). By implication, the dissent suggests that "[n]o disclosure of information is required," dissent at 872, and therefore no information can ever be required by a reviewing court. But even the dissent reads *Bustamante* to require the Government to pro-

vide the exact information listed in § 1182(b)(1)(B)—the statutory provision under which the alien is inadmissible—to demonstrate that the visa denial is "facially legitimate." Dissent at 869. By the dissent's own logic, that reading of *Bustamante* is "directly contradict[ed]" by the statute. Dissent at 873. If the statute allows the Government to decline to provide more information in this case, then it must allow the Government to decline to provide *any* information. This would decisively eliminate judicial review and this reading of the statute is therefore precluded by *Bustamante*, which guarantees some review, no matter how limited.

The dissent's concern about "this nation's desire to keep persons connected with terrorist activities from entering the country," dissent at 872, is, of course, valid, but the Government never asserted such an argument here. And even if it had, nothing in our opinion compels dangerous disclosure. Another imperfect analogy to criminal procedure exposes the fault in relying on the statute's purpose to justify withholding information. For the same reason that Congress added § 1182(b)(3)—the desire to not jeopardize an ongoing investigation by announcing its existence—subjects of criminal investigations are routinely not informed that they are being investigated. For example, search warrant proceedings are "necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." *Franks v. Delaware*, 438 U.S. 154, 169, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The need for secrecy does not, however, change the fact that the constitution guarantees a judicial determination of probable cause

prior to the issuance of a search warrant. *United States v. Grubbs*, 547 U.S. 90, 99, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006). It is inconceivable that the Government would argue that it could not provide the factual basis supporting probable cause based on the need to keep the investigation a secret—an *ex parte* hearing conceals the investigation, while still allowing judicial review.

In this case, if necessary, the Government could, as it does in other contexts, disclose the reason for Berashk's visa denial *in camera*. *See, e.g., Hunt v. C.I.A.*, 981 F.2d 1116, 1118 (9th Cir. 1992) (reviewing *in camera* affidavits justifying the decision to withhold information from Freedom of Information Act disclosure on national security grounds); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079-90 (9th Cir. 2010) (en banc) (describing the history and procedure of the state secrets doctrine and dismissing case). Existing procedures are adequate to address the national security concerns that we share with the dissent, and make it unnecessary to eliminate all judicial review and disclosure.

Because the Government has not offered a facially legitimate reason for the visa denial, the first part of the *Mandel* test is not met, and the decision is not subject to the prohibition on consular review. It is not necessary to address the second part of the test, whether the citation to § 1182(a)(3)(B) is bona fide. It is worth noting, however, that in *Bustamante*, we held that to prevail under the bona fide prong of the *Mandel* test a plaintiff must "allege that the consular official did not in good faith believe the information he had," 531 F.3d at

1062-63, and the dissent argues that "it would be impossible for plaintiff to plead [bad faith] because she did not know the particular basis for the denial of her husband's visa application." Dissent at 869. The "bona fide" inquiry is therefore eliminated under the dissent's approach because the Government can simply cite a statute—and only a statute—and because the plaintiff is not informed what the consular official believes, she can never allege that the belief is held in bad faith. This suggests that the dissent has come to the incorrect conclusion that a bare citation to a statute is a facially legitimate ground for exclusion. Because the Supreme Court articulated that the Government must put forward a "facially legitimate *and* bona fide reason," *Bustamante*, 531 F.3d at 1062 (citing *Mandel*, 408 U.S. at 770, 92 S. Ct. 2576) (emphasis added), it is unlikely that the "facially legitimate" requirement should be interpreted to allow the Government to withhold information and make an inquiry into the "bona fide" requirement "impossible."

B. Din's standing to challenge § 1182(b)(3)

The district court held that Din lacks standing to seek a declaratory judgment that 8 U.S.C. § 1182(b)(3) is unconstitutional as applied to her because the notice provisions apply to aliens, not to citizens with an interest in an alien's visa. As discussed above, we agree with the conclusion that § 1182(b)(3) does not apply to Din, and, for that reason, we do not think it supports the Government's motion to dismiss on consular nonreviewability grounds. When the case is resolved on the merits, it is possible that the court may conclude that it can avoid reaching Din's constitutional challenge to the

statute by determining that the statute, by its own terms, does not apply to her. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) (constitutional issues should be avoided if a statutory issue resolves the case). But in reviewing a motion to dismiss, we cannot project a specific outcome on the merits in order to decide the question of standing. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (noting that standing is distinct from the merits). For the purposes of evaluating standing, we "must construe the complaint in favor of the complaining party." *Id.* Here, the complaint alleges that the Government is using the statute to justify an action that is injuring Din. If the Government is doing so based on a flawed reading of the statute, that might provide a narrower ground to decide this case on the merits later, but it does not deprive Din of standing to challenge the law. *See Nw. Austin*, 557 U.S. at 205, 129 S. Ct. 2504.

To satisfy Article III's standing requirements, Din must show "(1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 180-81, 129 S. Ct. 2504. Further, a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*,

504 U.S. 555, 573 n. 7, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Din has a constitutionally protected due process right to limited judicial review of her husband's visa denial, which stems from her "[f]reedom of personal choice in matters of marriage and family life." *Bustamante*, 531 F.3d at 1061-62. To the extent that the Government relies on 8 U.S.C. § 1182(b)(3) to interfere with this right, Din has standing to challenge the provision. Din alleges that the Government has deprived her of due process by refusing to provide either her or her husband with a facially legitimate and bona fide reason for denying his visa. In so refusing, the Government in part relies on 8 U.S.C. § 1182(b)(3). A court's decision that 8 U.S.C. § 1182(b)(3) cannot defeat Din's claim could redress her injury. Therefore, § 1182(b)(3) appears to injure Din, and she has standing to challenge it.

IV. Conclusion

We decline the Government's invitation to turn our limited review into a mere formality. We conclude that the Government's citation to § 1182(a)(3)(B), in the absence of any allegations of proscribed conduct, is not a facially legitimate reason to deny Berashk's visa. Because the Government has not proffered a facially legitimate reason, Din's claims for a writ of mandamus directing the Government to adjudicate Berashk's visa application and for a declaratory judgment under the APA survive dismissal. Accordingly, we also conclude that Din has standing to challenge 8 U.S.C. § 1182(b)(3)

as it has been applied to her. We remand Din's claims for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLIFTON, Circuit Judge, dissenting:

The majority opinion acknowledges the doctrine of consular nonreviewability and the "highly constrained" nature of our judicial review of the denial of a visa *see Bustamante v. Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008), but in practice it fails to accept that doctrine and act within that constraint. Instead, assuming that judicial review must be more robust, it imposes upon the Government an obligation to provide information about a visa denial that, by statute, the government is specifically not required to provide when it denies a visa based on concerns for national security or terrorism. I respectfully dissent.

I. The Limited Nature of Judicial Review

The visa application of plaintiff's husband, Kanishka Berashk, a citizen and resident of Afghanistan, was denied by consular officials under 8 U.S.C. § 1182(a)(3)(B). Section 1182(a) identifies "classes of aliens ineligible for visas or admission" into the United States. The statute lists ten different categories of ineligible aliens, including one "miscellaneous" provision, subsection 1182(a)(10), which encompasses several unrelated grounds. One of the identified categories within section 1182(a) is subsection 1182(a)(3), entitled "Security and related grounds," one part of which, subsection 1182(a)(3)(B), is captioned "Terrorist activi-

ties." That provision was identified as the basis for the denial of Berashk's visa application.

As the majority opinion notes, at 7, we may review the denial of a visa only when the constitutional rights of an American citizen are implicated and then only by way of "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason." *Bustamante*, 531 F.3d at 1060. Those two elements—facially legitimate and bona fide—were drawn directly from the Supreme Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972).

We specifically held in *Bustamante* that denial of a visa based upon a statutory basis for inadmissibility is a denial for "a facially legitimate reason." 531 F.3d at 1062. We also made clear that the inquiry into whether the reason for the visa denial was bona fide is limited to the question of whether the decision was made in good faith. Whether the decision to deny the visa was correct is not the issue. Rather, a plaintiff must "allege that the consular official did not in good faith believe the information he had. It is not enough to allege that the consular official's information was incorrect." *Id.* at 1062-63.

The district court dismissed the action based upon its application of *Bustamante*. It concluded that reliance upon a statute, specifically section 1182(a)(3)(B), provided a facially legitimate reason for denying the visa application. As for the bona fide element, the district court noted that plaintiff had not alleged in her complaint that the consular officials acted in bad faith

or without a good faith belief in the information on which the denial was based. Further, the court held that it would be impossible for plaintiff to plead to that effect because she did not know the particular basis for the denial of her husband's visa application and thus would necessarily be unable to satisfy the plausible pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The district court was right.

The majority opinion bases its conclusion on what it describes as the lack of a facially legitimate reason to deny Berashk's application and says that it does not reach the question of whether the reason given was bona fide. Majority op. at 866-67. The denial here was based on a statute, however. That statute provided a lawful reason for denying the application. The relevant definition of "legitimate" is "accordant with law." *Webster's Third New International Dictionary* 1291 (2002). Because the denial of Berashk's application was based on law, the reason was at least "facially legitimate."

Although the majority opinion interprets *Bustamante* differently, by my reading that decision held that a statutory basis for inadmissibility is a facially legitimate reason. It stated:

> As set forth in the complaint, Jose was denied a visa on the grounds that the Consulate "had reason to believe" that he was a controlled substance trafficker. This is plainly a facially legitimate reason,

> as it is a statutory basis for inadmissibility. 8 U.S.C. § 1182(a)(2)(C).

Bustamante, 531 F.3d at 1062. The majority opinion asserts, at 11, that citation to the statute was not enough by itself, and that "[t]he *reason* for exclusion in *Bustamante* was that 'the Consulate "had reason to believe" that he was a controlled substance trafficker.'" But that portion of our opinion in *Bustamante* simply repeated what the complaint in that case had alleged was the stated reason, one that the plaintiffs disputed. There was no finding or determination by the court. The "facial" legitimacy rested upon the citation to the statute. This case is no different. There is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application.

Nor is there any factual basis for us to conclude or for plaintiff to allege that the reason for the denial was not bona fide because the consular official who made the decision acted in bad faith. Plaintiff alleges in her complaint that Berashk was not engaged in any terrorist activity and that no facts exist to support a conclusion that he is inadmissible under the statute. The Bustamantes similarly alleged that Jose Bustamante was not a drug trafficker and asked that the case be remanded for factual development, but we held that their complaint must be dismissed because they did not allege that the consular official did not in good faith believe the information he possessed. *Bustamante*, 531 F.3d at 1062-63. The factual basis of the consular's decision is not within our highly limited review. As we held in *Bustamante*, quoted above, it is simply

not enough to allege that the consular official's decision was wrong. That is not for us to decide.

The majority opinion holds that the reason given for excluding Berashk was inadequate in two ways, statutory and factual. Neither is persuasive.

First, it complains that the Government's reference to section 1182(a)(3)(B) is not sufficiently specific. It contends that the Government must cite to a statutory subsection narrow enough to permit the court to determine that it has been properly construed. Majority op. at 862-63. It observes that the statutory subsection cited in denying Berashk's application, section 1182(a)(3)(B), is longer than the statutory subsection cited in the denial of the application in *Bustamante*, section 1182(a)(2)(C). Majority op. at 862-63. But the length of a statute does not make it any less of a statute.[1]

Nor does it provide a principled justification for denying the facial legitimacy of the consular official's decision. It is the Government's application of the statute to Berashk—its assessment of the facts, not any "construction" of the statute—that is disputed by plaintiff here. The key allegation of plaintiff's complaint is that:

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[1] The citation was not as unspecific as the majority opinion suggests. Section 1182(a)(3)(B) contains several subsections, but all pertain to "terrorist activities." The Government did not simply cite to section 1182(a) as a whole. As discussed below, at 871-72, the Government is generally required to provide some explanation for a visa denial, but the statute explicitly provides that denials under section 1182(a)(3)(B) are different.

> No good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B). The fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist.

Plaintiff has argued that the cited subsection is an "umbrella" statute that is not specific enough for Berashk to know what to try to rebut, but plaintiff has not argued that the State Department might have misinterpreted this statute committed to its authority by Congress, and there is nothing in the record that suggests that it has.

The second reason given by the majority opinion is that the plaintiff and the court have not been provided by the Government with enough factual information to "allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied." Majority op. at 861. That gets closer to what I perceive to be the majority opinion's actual concern. The majority opinion is premised on the assumption that the court must be provided with whatever additional information we deem necessary to permit us to conduct a more thorough review and on the corollary that we have the power to require the Government to provide that additional information. Thus, the majority opinion holds that the Government "must at least allege what it believes Berashk did that would render him inadmissible." *Id.* at

863. Otherwise, the majority opinion asserts, our review would be only a "rubber-stamp."[2]

We must recognize, however, that "[t]he power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country and to have its declared policy in that regard enforced exclusively by executive officers, without judicial intervention, is settled by our previous adjudications." *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547, 15 S. Ct. 967, 39 L. Ed. 1082 (1895)) (internal quotations omitted). Analysis of the applicant's underlying conduct has "been placed in the hands

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[2] The majority opinion supports this statement with a citation with a "cf." signal to *United States v. DeGeorge*, 380 F.3d 1203, 1215 (9th Cir. 2004), describing that case as holding that "courts should 'not simply rubber-stamp the government's request, but hold the government to its burden.'" That citation provides no support for the majority opinion's conclusion here. To begin with, that criminal appeal had nothing whatsoever to do with the issue in this case. It made no mention of the doctrine of consular nonreviewability nor any reference to the highly constrained review that we are to apply here. Rather, it addressed a court order issued at the request of the government to toll the statute of limitations because evidence was located in a foreign country, based on a statute that authorized such tolling, 18 U.S.C. § 3292. Moreover, as our decision noted, the judicial review in that case was expressly required by that statute. *DeGeorge*, 380 F.3d at 1213-14 (citing 18 U.S.C. § 3292(a)(1)). When a statute requires that the district court make a given finding before issuing an order, it is no surprise that in reviewing the district court's order we held that the Government must be held to its burden. No similar authorization for judicial review exists here.

of the Executive." *Mandel*, 408 U.S. at 769, 92 S. Ct. 2576. Our review here is supposed to be highly restrained.

That does not mean that our review is purely a formality or, as the majority opinion describes it, a rubber stamp. In many instances there will be more specific information available about the basis for a visa denial. When there is more information available, it is appropriate for a court to examine that information, as our court did in *Bustamante*, albeit still in the course of a limited review. But, as discussed below, Congress has specifically provided that the Government is not required to provide specific information about what lies behind a visa denial under subsection 1182(a)(3), the basis for the denial of Berashk's application. When the statute says that the Government does not have to disclose that information, compelling it to disclose the information anyway in order to allow "limited" and "highly restrained" judicial review cannot be justified.

II. 8 U.S.C. § 1182(b)

By requiring the Government to disclose more specific information about the denial of Berashk's visa application, the majority opinion effectively disregards the statute that says that the government is not obligated to disclose that information.

After the categories of aliens deemed ineligible for visas are identified in 8 U.S.C. § 1182(a), the next part of the statute, section 1182(b), provides for the notice to be given following the denial of a visa application. For denials based on most of the subsections of section 1182(a), some notice of the determination and its statu-

tory basis is required.[3] But the statute, in section 1182(b)(3), explicitly carves out denials based on two subsections: 1182(a)(2) ("Criminal and related grounds") and 1182(a)(3) ("Security and related grounds"). No disclosure of information is required when a visa denial is based on one of those subsections.

The denial of Berashk's visa was based on subsection 1182(a)(3). Under section 1182(b)(3), the Government was not required to provide more specific information

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[3] 8 U.S.C. § 1182(b) provides:

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

The United States Code Annotated notes that the language quoted above from section 1182(b)(1)(B) is presented that way in the statute but that the word "adjustment" should probably be preceded by "ineligible for."

regarding that denial.[4] The majority holds otherwise without giving serious consideration to the impact of section 1182(b)(3).

Plaintiff realizes that this statute poses a serious obstacle to her claim, and in her complaint, she presents as a separate claim for relief a challenge to the constitutionality of section 1182(b) as applied to her. The constitutional basis for the challenge is only vaguely described in the complaint as "procedural due process under the Fifth Amendment." The district court held that the notice provision only applies to the alien applicant for the visa, in this case Berashk, and not to his U.S. citizen wife, the plaintiff in this case, so it concluded that plaintiff lacked standing to challenge the statute. The majority opinion disagrees and reverses that part of the district court's order as well.

The majority opinion does not conclude that the statute is unconstitutional, however. Plaintiff has not yet presented her argument to that effect on the merits. The proposition that this nation's desire to keep persons connected with terrorist activities from entering the country must be subordinated to plaintiff's desire

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[4] Contrary to the majority's assumption, at 865, the lack of an affirmative right to compel disclosure does not "function[] as an implied prohibition" against disclosure. Rather, courts are prohibited from demanding disclosure, in this context, and our cases say it explicitly. *See Bustamante*, 531 F.3d at 1062 (rejecting Bustamante's argument for remand in order to require the government "to present specific evidence to substantiate the assert[ed]" basis for the visa denial). Accordingly, the majority's inapposite discussion of *Brady* obligations, an area of law requiring robust judicial review of due process, lends no support to its holding.

for the information based on "procedural due process" strikes me as highly unlikely, particularly when there is no allegation that the Government failed to provide plaintiff or her husband the process that is required by the applicable statute.

What matters for now, though, is that the majority opinion effectively nullifies the statute simply by asserting that it "does not apply to Din." Majority op. at 867.[5] That misses the point. Even if the limitation on disclosure does not apply to Din, nothing else gives her the right to demand that the Government provide the information to her. More broadly, Congress has required disclosure to applicants of information regarding visa denials, except for denials based on criminal or security grounds. It makes no sense to read the statute to require disclosure for such denials simply because there might be a U.S. citizen interested in the application.

That statute should not be ignored. It directly contradicts the majority opinion's holding that the Government must provide more information about the denial of Berashk's visa. The statute says otherwise.

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[5] The majority opinion describes this as a concession by the Government. Actually, it is the reason why the Government has argued, as the district court concluded, that Din does not have standing to challenge the exclusions under the statute. The majority opinion concludes that Din does have standing, but its broader conclusion that the statute can be disregarded because it does not apply to Din means that Din's procedural due process challenge is irrelevant—in which case she actually would lack standing.

In my view, the majority opinion has gone astray in two different ways. It fails to honor the highly constrained nature of judicial review of a decision to deny a visa application. And, in the process, it orders the government to disclose information that the relevant statute says that the government does not have to provide. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 10-0533 MHP

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

HILARY CLINTON, SECRETARY OF STATE, JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ERIC HOLDER, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

June 22, 2010

MEMORANDUM & ORDER

MARILYN HALL PATEL, District Judge.

Plaintiff Fauzia Din ("Din") filed the instant action against various governmental defendants seeking review of the government's determination that her husband, Kanishka Berashk, is inadmissible into the United States under Section 212(a)(3)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(3)(B). Having considered the parties' arguments and submissions, the court enters the following memorandum and order.

BACKGROUND

Unless otherwise noted, the following facts are taken from plaintiff's complaint. Docket No. 1 (Complaint). Din was born in Kabul, Afghanistan but fled to Pakistan in 1996 to escape the Taliban regime. She entered the United States in 2000 as a refugee, and became a naturalized citizen of the United States on November 20, 2007.

In September 2006, Din returned to Afghanistan to marry Kanishka Berashk, whom she had known for many years. Berashk was born in Kunduz, Afghanistan and currently lives in Kabul. Since 2003, he has been employed as a government clerk in the Afghan Ministry of Education, where his duties primarily involve processing paperwork. Prior to 2003, Berashk served as a payroll clerk in the Afghan Ministry of Social Welfare, where he processed payroll for school teachers. Plaintiff alleges that during the Taliban occupation of Afghanistan from 1996-2001, Berashk never implemented, nor was asked to implement, any policy changes on behalf of the Taliban. In addition, plaintiff attests that Berashk never had direct contact with the Taliban regime.

Shortly after her marriage, Din returned to the United States and filed a visa petition for Berashk. On February 12, 2008, the United States Citizenship and Immigration Services ("USCIS") informed Din that her petition had been approved and had been forwarded to the National Visa Center for processing. On July 29, 2008, the National Visa Center informed Din that it had completed the necessary processing. It then sched-

uled an interview with Berashk at the Islamabad Embassy. On September 9, 2008, Berashk appeared at the Islamabad Embassy for the visa interview and answered all questions asked of him both truthfully and accurately. After the interview, the consular officer gave Berashk a Form 194 letter stating that "Mr. Yaqubi" of the Kabul Embassy would send his passport to the Islamabad Embassy "which will issue the visa and return [the passport] to the Kabul Embassy." The consular officer instructed Berashk to deliver his passport to the Kabul Embassy. During this exchange, Berashk was given no indication of any impediments to his visa application. The consular officer told Berashk that Berashk could expect to receive his visa in two to six weeks, and that the officer was pleased with Berashk's paperwork.

Berashk, however, did not receive his visa within two to six weeks. Berashk placed numerous calls to the Islamabad Embassy between October 2008 and January 2009 to inquire about the status of his application. He was unable to receive any information from the Embassy. On January 28, 2009, Berashk sent an email to the Immigration Visa Unit of the Embassy inquiring about his application. He received the following response: "Our record indicates that the case is still pending under administrative process and we will contact the applicant(s) upon completion of this process. Also, time duration for the process is always approximated [sic] therefore [sic] cannot be predicted." Berashk and Din waited five more months to receive a response. Although they both contacted the Embassy numerous times during this time to determine the sta-

tus of the visa application, they did not receive any additional information.

In early June 2009, United States Congressman Pete Stark sent a letter on Din's behalf to the Islamabad Embassy inquiring about the status of Berashk's application. Before Stark received a response, on June 7, 2009, Berashk received a Form 194 letter stating that his application had been denied pursuant to Section 212(a) of the INA and that there was "no possibility of a waiver of this ineligibility." The form did not indicate which subsection of the statute applied to Berashk. The letter also included an instruction to refer to Form DSL-851A for further details; however, the referenced form was not included with the denial. Berashk never received the DSL-851A form. On June 16, 2009, Representative Stark received a response from Christopher J. Richard, Consul General, which stated: "Mr. Berashk's case continues to undergo administrative processing [a]pplicants may have to wait several months or longer before their visas are issued." Although the letter was dated eleven days after Berashk's application was denied, it nonetheless noted that the application was still pending.

On July 11, 2009 Berashk sent an email to the Islamabad Embassy asking why, specifically, his application had been denied. On July 13, 2009 the Embassy responded, stating that Berashk's application was denied under INA section 212(a)(3)(B), which specifies terrorism-related grounds for inadmissibility.[1] The

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[1] INA section 212(a)(3)(B), codified as 8 U.S.C. section (a)(3)(B) states that an alien is admissible who:

email also stated that "[i]t is not possible to provide a detailed explanation of the reasons for refusal" and cited INA subsections (b)(2)-(3), codified at 8 U.S.C. sections 1182(b)(2)-(3). 8 U.S.C. section 1182(b)(3) al-

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(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years

lows the government to withhold the specific reasons for the denial for aliens who have been determined to be inadmissable under 8 U.S.C. section 1182(a)(2) or (a)(3). Din then unsuccessfully attempted to get further information from numerous sources, including the Kabul Embassy, the Islamabad Embassy, LegalNet, the Office of Visa Services, and the Public Inquiries Division of the U.S. State Department. On January 4, 2010, USCIS sent Din a Form I–797 "Notification of Action," signaling the finality of denial.

Din brings this action seeking a writ of mandamus directing defendants to "properly adjudicate" Berashk's visa application.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). A motion to dismiss should be granted if a plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, —, 129 S. Ct. 1937, 1949,

173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556). Allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept as true pleadings that are no more than legal conclusions or the "formulaic recitation of the elements" of a cause of action. *Iqbal*, 129 S. Ct. at 1940; *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

DISCUSSION

Defendants have moved to dismiss asserting a lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). Din counters, arguing that the government must provide a facially legitimate and bona fide reason for the denial of her husband's visa application.

Din's allegation that the government violated her constitutional rights to due process by denying her husband's visa application satisfies the subject matter jurisdiction requirements of 28 U.S.C. section 1331. In *Bustamante v. Mukasey*, the Ninth Circuit held that although "it has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review, courts have identified a limited exception to

the doctrine where the denial of a visa implicates the constitutional rights of American citizens." 531 F.3d 1059, 1061 (9th Cir. 2008). Just as in *Bustamante*, Din asserts that she has a protected interest in her marriage, which gives rise to a right to challenge the constitutionality of the procedures used in the consideration of her husband's visa application. *Id.* ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause."). Thus, just as in *Bustamante*, "a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision. As long as the reason given is facially legitimate and bona fide the decision will not be disturbed." *Id.* The court considers each prong—facially legitimate and bona fide—in turn.

I. *Facially legitimate*

The government cites to 8 U.S.C. section 1182(a)(3)(B) as the reason for the denial of Berashk's visa. In *Bustamante*, plaintiff's visa was denied pursuant to section 1182(a)(2)(c), and the court held that "[t]his is plainly a facially legitimate reason, as it is a statutory basis for inadmissability." *Id.* at 1062. Similarly here, the citation to 8 U.S.C. section 1182(a)(3)(B) is a facially legitimate reason.

Din argues that Section 1182(a)(3)(B) is comprised of numerous grounds for inadmissability and that she was not informed about which particular ground the government applied here. Consequently, she contends that the lack of granularity renders the reason facially

illegitimate. This granularity, however, need not be provided. According to 8 U.S.C. section 1182(b)(3), the government may withhold the specific reasons for the denial for aliens who have been determined to be inadmissable under 8 U.S.C. section 1182(a)(2) or (a)(3). Consequently, a reference to Section 1182(a)(3) is sufficient to be facially legitimate.

II. *Bona fide reason*

Din argues that the government must demonstrate that its reason for denying Berashk's visa was bona fide. Din confuses the burden of proof on the issue. A valid statutory basis also qualifies as a bona fide reason for denial unless the plaintiff "[makes] an allegation of bad faith sufficient to withstand dismissal." *Bustamante*, 531 F.3d at 1062-63; *see also Amer. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (holding that a consular officer's facially legitimate decision was non-reviewable "in the absence of a well-supported allegation of bad faith, which would render the decision not bona fide"). Din therefore bears the burden of pleading a well-supported allegation of bad faith sufficient to withstand dismissal.

Din claims that "[t]he fact that Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds for inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." Complaint ¶ 57. This assertion, which the court will assume is true for the purposes of this motion, is insufficient to allege bad faith. "Under *Man-*

del's limited inquiry, the allegation that the Consulate was mistaken about [the visa applicant's] involvement with [illegal activities] fails to state a claim upon which relief could be granted." *Bustamante*, 531 F.3d at 1063. Although Din's allegation suggests that the government may have been mistaken in failing to grant the visa on terrorism-related grounds, it does not suggest that the "consular official did not in good faith believe the information he had." *Id.* at 1062. Nor does it allege that the consular official did not receive the pertinent information from other governmental o-ganizations or acted upon information she knew to be false. *Id.* at 1063. In this respect, the situation here is indistinguishable from *Bustamante*, where "the Bustamantes alleged in their complaint that Jose is not and never has been a drug trafficker," except that Din alleges that Berashk has never engaged in terrorism-related activities. *Id.* In sum, while the facts that Din has pled may be "consistent" with a finding of bad faith; they do not cross the line from possibility to plausibility of entitlement to relief. *Iqbal*, 129 S. Ct. at 1949.

For the same reasons, Din's allegation that the Form 194 letter states that the Islamabad embassy will issue Berashk's visa does not suggest bad faith. Din does not allege that Berashk was told that the visa would be granted, simply that if it were to be granted, it would be issued by the Islamabad embassy. Morever, this allegation suggests simply that the statements in the letter may have been made either improvidently or prematurely, not in bad faith. Din's blanket assertion that "[n]o good faith exists that is sufficient to constitute a

facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B)" is also insufficient. Complaint ¶ 57. Under *Iqbal*, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Therefore, Din has failed to state a claim upon which relief can be granted.

Din urges the court to delve deeper into the factual issues here. She cites to various parole denial cases to support this contention. However, as the Second Circuit has held, the reasoning in these cases cannot be used when assessing the legitimacy of a visa denial:

> We doubt that the judicial decisions reviewing administrative denial of parole are even applicable to the consular denial of a visa. Although several courts purport to apply the *Mandel* standard when reviewing denials of parole, the parole and visa decisions are significantly different. Parole concerns release from determination; a visa concerns admission into this country. It is understandable that some courts exercising habeas jurisdiction would make at least a limited factual inquiry as to a local District Director's ground for confining an alien. But a similar inquiry does not seem appropriate concerning the visa decision of consular officers stationed throughout the world.

Amer. Acad. of Religion, 573 F.3d at 136. This court agrees with the Second Circuit's rationale. Din's attempt to draw support from *Allende v. Shultz* is like-

wise unpersuasive because "that decision declared a visa denial invalid because the supporting affidavit made clear that the denial had been based on the applicant's prior speeches, activity that the Court ruled was an impermissible basis under then-existing law." *Id.* (citing *Allende v. Shultz*, 845 F.2d 1111, 1120-21 (1st Cir. 1988)). This court therefore declines to undertake a more sweeping factual inquiry.

The court is aware that because the government invoked its statutory right under 8 U.S.C. section 1182(b)(3) to withhold explanation of its rejection of Berashk's visa application, Din possesses little relevant information with which to meet the requirements of Rule 8. Although the burden is on plaintiff to make a well-supported allegation of bad faith, here, because of Section 1182(b)(3), it is nearly impossible for Din to obtain and therefore plead any facts that would meet the pleading standard under *Iqbal*. Indeed, Din does not even know the particular basis for the rejection of the visa application. Nor does Din know the information the government relied upon when making its determination. Consequently, Din cannot plead that the Consulate did not receive the relevant information from other governmental agencies, or that the "Consulate acted upon information it knew to be false." *Bustamante*, 531 F.3d at 1063. It therefore appears that there is effectively no opportunity for review or recourse for spouses of visa applicants who are denied further information about their rejections under Section 1182(b)(3). Nevertheless, the catch-22 created by Section 1182(b)(3) cannot be resolved by a mere incantation that the government acted in bad faith. Thus,

on the record before the court, there is no reason to believe that the consular officer acted in bad faith. Therefore, the first and third causes of action are dismissed.

III. *Notice provision*

Din also seeks, as her second cause of action, a judicial declaration that the notice of denial provisions in 8 U.S.C. section 1182(b)(3) are unconstitutional as applied to her. The notice provisions, however, apply only to the alien and not the United States citizen; consequently, Din lacks standing to challenge the statute.

CONCLUSION

Defendants' motion to dismiss is GRANTED. The Clerk of the Court shall close the file.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16772
D.C. No. 3:10-cv-00533-MHP
Northern District of California
San Francisco

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

JOHN F. KERRY, SECRETARY OF STATE; JANET A. NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL, ATTORNEY GENERAL OF THE UNITED STATES; RICHARD OLSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; CHRISTOPHER RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; JAMES B. CUNNINGHAM, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN, DEFENDANTS-APPELLEES

[Filed: Dec. 24, 2013]

ORDER

Before: CLIFTON and MURGUIA, Circuit Judges, and COLLINS, Chief District Judge.*

Judge Clifton has voted to grant the petition for rehearing en banc. Judge Murguia has voted to deny the petition for rehearing en banc and Judge Collins so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing en banc, filed September 9, 2013, is DENIED.

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* The Honorable Raner C. Collins, Chief United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D

1. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the of-

fenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the

United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of Title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or col-

luder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland

Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and

convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's

past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any

other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the

party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of Title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of Title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the

Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18, is inadmissible.

* * *

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment[4] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

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[4] So in original. Probably should be preceded by "ineligible for"

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

OPPOSITION BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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No. 13-1402

IN THE

Supreme Court of the United States

JOHN F. KERRY, *et al.*,

Petitioners,

v.

FAUZIA DIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a consular official's refusal of a visa to a U.S. citizen's alien spouse impinges upon a constitutionally protected interest of the citizen.

2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.

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INTRODUCTION

If Respondent Fauzia Din were an American college professor, and invited an Afghan national to give a speech at her university, the denial of a visa would implicate her First Amendment right to hear and speak, in person, with the Afghan national. *Kleindienst* v. *Mandel*, 408 U.S. 753, 764-65 (1972). The intrusion on her First Amendment rights would not allow a reviewing court to balance her interests against those of the Executive in denying the visa. But that intrusion would entitle her to have a court determine whether the government's reason for denying the visa was facially legitimate and bona fide. *Id.* at 762, 769-70.

Din is not a professor. She is a United States citizen who applied for a visa for an Afghan national because, after years of knowing him and two years of being engaged to him, she married him and wants him to live with her in America. The Ninth Circuit recognized that the denial of a visa to the spouse of a U.S. citizen implicates that citizen's liberty interests in her marriage and entitles her to the same minimal procedural due process accorded a college professor arranging a conference.

No appellate court has ever denied a United States citizen that minimal due process right. The government points to *Bangura* v. *Hansen*, 434 F.3d 487 (6th Cir. 2006), and *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), as being "directly contrary" (Pet. 18-19), but there is no conflict because there, unlike here, the citizens already knew why their spouses were being excluded or deported, and thus those courts adjudicated and rejected far broader claims. The government told Mr. Bangura that his wife had previously abused the im-

migration system by fraudulently marrying another man in an effort to obtain a visa. *Bangura*, 434 F.3d at 492. In the *Burrafato* case, the government filed an affidavit in the district court stating the reason it denied Mr. Burrafato his visa and the specific subsection of the Immigration and Naturalization Act ("INA") under which he was excludable, and so the Second Circuit, like the Sixth Circuit, never addressed or decided the issue Din raised here. *Burrafato*, 523 F.2d at 555, 556 & nn.2, 3; *see* pages 21-24, *infra*.

None of the other cases the government cites is on point. They involve the deportation of alien residents, but Congress has already provided for deportation hearings and other procedural protections that go beyond the minimal due process right to a facially legitimate and bona fide reason that *Mandel* and other cases provide in the case of a visa denial. The issue in these other cases typically has been whether a citizen's liberty interest in her marriage trumps the government's right to exclude or deport an alien spouse; it has not been whether the liberty interest is sufficient merely to require the government to provide a legitimate and bona fide explanation for the government's conceded right to deny a spouse a visa when the circumstances Congress has specified for such denial exist.

The government also has not established that this individual case is important enough to warrant this Court's plenary review. The government never asserted that its particular reasons for denying a visa to Din's spouse were of such national security interest that they could not be publicly disclosed or provided to the court using the safeguards and procedures that courts regularly use when classified or sensitive information is needed. Pet. App. 20a. The Ninth Cir-

cuit nonetheless made it "emphatically clear" that "nothing in our opinion compels dangerous disclosure." *Id.* at 18a, 20a. The Ninth Circuit's decision to return this case to the district court for further proceedings, "*in camera*" if need be (*id.* at 21a), for "the limited judicial review established by the Supreme Court in *Mandel*" (*id.* at 9a), is faithful to the decisions of this Court, conflicts with no circuit court decision, and presents no question that warrants this Court's review.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Din's Visa Petition On Behalf Of Her Husband

Fauzia Din is a United States citizen. Born in Afghanistan, she fled the Taliban occupation in 1996. Pet. App. 38a. She entered the United States as a refugee in 2000, and subsequently became a citizen. *Id.*

In 2004, Din became engaged to Kanishka Berashk, an Afghan native who resides in Afghanistan. Din and Berashk had known each other for many years before their engagement. Pet. App. 38a. Din returned to Afghanistan in September 2006 and married Berashk. *Id.*

On October 11, 2006, Din filed a visa petition (Form I-130, Petition for Alien Relative) on behalf of Berashk. On February 12, 2008, the United States Citizenship & Immigration Services ("USCIS") notified Din that her visa petition for Berashk had been approved and sent to the Department of State National Visa Center for further processing. Pet. App. 38a. On July 29, 2008, the National Visa Center notified Din that it had scheduled an immigrant visa in-

terview for Berashk at the United States Embassy in Islamabad, Pakistan. *Id.* at 38a-39a.

B. Delay And Denial Of The Visa

At his immigrant visa interview in Islamabad on September 9, 2008, Berashk answered all of the consular officer's questions truthfully and accurately, including questions about his marital relationship with Din and his work as a clerk, first in the Afghan Ministry of Social Welfare processing payroll for school teachers, and later in the Afghan Ministry of Education processing other paperwork, before, during, and after the Taliban occupation. Pet. App. 39a. At the conclusion of the interview, the consular officer instructed Berashk to deliver his passport to the Kabul Embassy and handed him a Form 194 letter stating that the Kabul Embassy would send his passport to the Islamabad Embassy, "'which will issue the visa and return [the passport] to the Kabul Embassy.'" *Id.* (alteration in original). Berashk received no indication of any problems with the visa petition. *Id.* Instead, the consular officer said he was pleased with Berashk's paperwork and told him to expect his visa in two to six weeks. *Id.*

Although Berashk followed the consulate's instructions, he did not receive his visa within two to six weeks. Pet. App. 39a. He placed numerous calls to the Islamabad Embassy between October 2008 and January 2009 inquiring about the status of the visa petition, but he received no information in return. *Id.* On January 29, 2009, Berashk sent an email to the Immigration Visa Unit of the Embassy inquiring about his petition. *Id.* He was advised that the "'record indicates that the case is still pending under administrative process.'" *Id.* Din and Berashk placed numerous calls to the Embassy between February and June, 2009, but they did not receive any addi-

tional information about the status of the visa application. *Id.* at 39a-40a.

In early June 2009, Representative Pete Stark, the U.S. Representative from California's 13th District (where Din resides), sent a letter on Din's behalf to the Islamabad Embassy regarding the status of Berashk's visa application. Pet. App. 40a. On June 7, 2009, Berashk received a Form 194 letter from an "American Consular Officer" whose initials appear to be "NP", dated June 5, 2009, which stated that the visa application had been denied under section 212(a) of the Immigration & Nationality Act ("INA") [8 U.S.C. § 1182(a)], and there was "'no possibility of a waiver of this ineligibility.'" *Id.* The letter did not state which subsection of INA section 212(a) applied to Berashk. *Id.*

On June 16, 2009, eleven days after Berashk was told his visa application was denied, Representative Stark received a response from the Consul General stating that "'Mr. Berashk's case continues to undergo administrative processing'" and "'[a]pplicants may have to wait several months or longer before their visas are issued.'" Pet. App. 40a (alteration in original).

On July 11, 2009, Berashk sent an email to the Islamabad Embassy requesting clarification as to why the visa application was denied. Pet. App. 40a. On July 13, 2009, the Embassy responded, stating that the application was denied under INA section 212(a)(3)(B) [8 U.S.C. § 1182(a)(3)(B)]. *Id.* The email further stated that "'[i]t is not possible to provide a detailed explanation of the reasons for the refusal,'" citing INA sections 212(b)(2), and (3) [8 U.S.C. § 1182(b)(2), (3)]. *Id.* at 41a. Din and Berashk's subsequent and repeated requests, including requests on their behalf by Representative Stark and pro bono

counsel, went unanswered. *Id.* at 42a. On January 4, 2010, USCIS sent Din a Form I-797 "Notification of Action" indicating that USCIS had received her visa petition back from the State Department, signaling the finality of denial. *Id.*

II. COURSE OF PROCEEDINGS

On February 5, 2010, Din filed a complaint in the United States District Court for the Northern District of California seeking to compel defendants to adjudicate her husband's visa application "in a manner prescribed by law and not on the basis of any illegitimate or bad faith reasons." ER 13 (Complaint, Prayer for Relief ¶ 1). The complaint alleged that there is no "facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B)." ER 11 (Complaint ¶ 57). The fact of Mr. Berashk's "low level employment" as a clerk in the Afghan Ministry of Social Welfare before, during and after the Taliban occupation of Afghanistan "alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." *Id.* In the absence of a facially legitimate and bona fide reason, the complaint alleged that the denial of Berashk's visa violated Din's liberty interest in her marriage. ER 10-11 (Complaint ¶ 56). The complaint also alleged that 8 U.S.C. § 1182(b)(3), which provides that the alien must be given notice of the ground for exclusion except where the alien is excludable under 8 U.S.C. §§ 1182(a)(2) or 1182(a)(3), does "not address notice provisions for *U.S. citizens*" and, to the extent it applies to Din, it is unconstitutional. ER 11-12 (Complaint ¶¶ 62-64). The complaint also alleged violation of the Administrative Procedure Act. ER 12 (Complaint ¶¶ 65-68).

The government filed a motion to dismiss, which the district court granted on June 22, 2010. Pet. App. 37a, 43a, 49a. The court acknowledged that just as in *Bustamante* v. *Mukasey*, Din asserts that the denial of her husband's visa implicates her right to marriage, so she is "'entitled to a limited judicial inquiry into the reason for the decision.'" *Id.* at 44a (quoting 531 F.3d 1059, 1061 (9th Cir. 2008)). "'As long as the reason given is facially legitimate and bona fide it will not be disturbed.'" *Id.* (quoting *Bustamante*, 531 F.3d at 1061). The court found the government's stated reason for denying Berashk's visa met that standard. Although the government did not identify which of the "numerous grounds for inadmissibility" under section 1182(a)(3) applied, the court thought this "granularity" need "not be provided," and a "reference to Section 1182(a)(3) is sufficient to be facially legitimate." *Id.* at 44a-45a. The court also found that although the allegations of the complaint were "'consistent' with a finding of bad faith[,] they do not cross the line from possibility to plausibility of entitlement to relief' as required by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Pet. App. 46a. The court acknowledged that Din was in a "catch-22" situation because the government withheld the explanation of the reason for its rejection of the visa application. *Id.* at 48a. Without this information, it is "nearly impossible for Din to obtain and therefore plead any facts that would meet the pleading standard under *Iqbal*." *Id.* Although it "appears that there is effectively no opportunity for review or recourse for spouses of visa applicants who are denied further information," the court felt constrained to dismiss the complaint for failure to state a claim.[1] *Id.* at 48a-49a.

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[1] The court also held that Din lacks standing to challenge the

On appeal, the United States Court of Appeal for the Ninth Circuit, in a 2-1 ruling, reversed and remanded the case. Both the panel majority and the dissent agreed that Din was entitled to limited judicial review of the visa denial because the denial implicated her "right to [f]reedom of personal choice in matters of marriage and family life." Pet. App. 6a-7a & n.1 (quotations omitted; alteration in original) (panel majority); *id.* at 26a (Clifton, J., dissenting). The panel majority and dissent also agreed that the court's review, drawn from this Court's decision in *Mandel*, is only to determine whether the consular official acted on the basis of facially legitimate and bona fide reason. *Id.* at 6a-7a; *id.* at 26a. In performing that review, the majority stated, "[t]o be clear, we do not 'look behind' exclusion decisions, but we must at least look at them," *id.* at 13a (citation and quotations omitted), and it discussed the limited review courts had provided in the few cases where the issue has arisen, in all of which the government had provided a reason that the courts had found sufficient. *Id.* at 8a-14a & n.2. The majority and dissent differed only on whether the government's bare citation to section 1182(a)(3)(B) met that standard.

The dissent thought that merely identifying a statute that authorized exclusion was sufficient to state a facially legitimate and bona fide reason. Pet. App. 27a-29a. The panel majority disagreed. *Id.* at 9a. Without "factual allegations that would allow [the court] to determine if the specific subsection of § 1182(a)(3)(B) was properly applied," it could not provide review comparable to what other courts had done, and would have no basis on which to find a fa-

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notice of denial provisions in 8 U.S.C. § 1182(b)(3), because they "apply only to the alien and not the United States citizen." Pet. App. 49a.

cially legitimate and bona fide reason for the visa denial. *Id.* Although the majority emphasized that the government "need not *prove* that Berashk performed an activity that renders him inadmissible under the statute, it must at least ***allege*** what it believes Berashk did that would render him inadmissible." *Id.* at 14a (emphasis added; citation omitted). Without that explanation, "[a]ny judicial review would be wholly perfunctory," and "it cannot be that Din's constitutional right to review is a right only to a rubberstamp on the Government's vague and conclusory assertion of inadmissibility." *Id.*

The majority also rejected the dissent's argument that, under section 1182(b)(3), the government "was not required to provide more specific information regarding the denial of Berashk's visa." Pet. App. 17a (quotations omitted). The dissent cited "no authority" that "an alien's lack of an affirmative statutory right to information functions as an implied prohibition on any disclosure to all people," and the majority "decline[d] to adopt such a position." *Id.* at 18a. Allowing the government to withhold the reasons for its action "is inconsistent with any concept of judicial review." *Id.* at 19a.

Finally, the majority emphasized that although the government had "never asserted" that significant national security issues were at stake in this particular case, nothing in its opinion compels the government to make "dangerous disclosure[s]."[2] Pet. App. 20a. If

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[2] Because the majority concluded that the government's stated reason for denying Berashk's visa was not facially valid, it found it unnecessary to decide whether the government's reason was bona fide. Pet. App. 21a. The majority also reiterated that "§ 1182(b)(3) does not apply to Din" and does not support the government's motion to dismiss on grounds of consular nonreviewability. *Id.* at 22a. To the extent, however, that the

necessary, the government may disclose the reason for the visa denial *in camera*, as is done in suits challenging the withholding of information under the Freedom of Information Act ("FOIA"). *Id.* at 21a. The majority concluded that "[e]xisting procedures are adequate to address the national security concerns we share with the dissent, and make it unnecessary to eliminate all judicial review and disclosure." *Id.* The court therefore remanded Din's claims to the district court for further proceedings. *Id.* at 25a.

The Government subsequently petitioned the Ninth Circuit for rehearing en banc. The Ninth Circuit declined to rehear the case.

REASONS FOR DENYING THE PETITION

The government seeks review of the court of appeals' holding that "[w]hen the denial of a visa implicates the constitutional rights of an American citizen," such as the right to marry, the court will "exercise 'a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.'" Pet. App. 6a. That narrow holding is correct and does not conflict with any decision of this Court or any appellate court. Further review is not warranted.

Government relies on § 1182(b)(3) to interfere with Din's right to freedom of choice in matters of marriage of family life, "Din has standing to challenge the provision." *Id.* at 24a.

I. THIS COURT AND COURTS IN SEVERAL CIRCUITS HAVE ENGAGED IN LIMITED JUDICIAL REVIEW OF THE DENIAL OF ALIEN VISAS THAT IMPLICATE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS, AND THERE IS NO REASON FOR THE COURT TO RECONSIDER THAT PRECEDENT HERE.

1. This Court has held that "an unadmitted and nonresident alien" has "no constitutional right of entry to this country," and Congress has "'plenary power'" to make rules for the admission and exclusion of aliens. *Mandel*, 408 U.S. at 762, 766 (citing cases); *see also, e.g., United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). From these holdings, the lower courts have developed a "doctrine of consular nonreviewability," where courts presumptively will not entertain an alien's challenge to a consular official's denial of a visa. The Ninth Circuit follows that doctrine. *See, e.g., Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986) ("it has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review"). The validity of the doctrine was not questioned by the Ninth Circuit panel below. *See* Pet. App. 6a (acknowledging that under the doctrine of consular nonreviewability, "[f]ederal courts are generally without power to review the actions of consular officials") (quotations omitted; alteration in original).

This case, however, is not brought by an alien. Here, a U.S. citizen seeks judicial review of the government's deprivation of her constitutional rights. Accordingly, this case falls within the "limited excep-

tion to the doctrine of consular nonreviewability" that exists when "the denial of a visa implicates the constitutional rights of an American citizen." Pet. App. 6a. As both the panel majority and the dissent agreed, an American citizen whose constitutional rights are implicated may obtain "'a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.'" *Id.* (quoting *Bustamante*, 531 F.3d at 1060); *id.* at 26a (Clifton, J., dissenting) (same).

The Ninth Circuit is not alone in allowing limited judicial review when a consular official's denial of a visa implicates the constitutional rights of an American citizen. As the panel explained (and the Petition nowhere disputes), the other circuits that have addressed the issue likewise "have exercised jurisdiction over citizens' challenges to visa denials that implicate the citizens' constitutional rights." Pet. App. 6a-7a; *see Am. Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 123-26 (2d Cir. 2009) (suit by American citizens whose First Amendment rights were implicated by denial of visa to Islamic scholar invited to speak in the United States); *Adams* v. *Baker*, 909 F.2d 643, 647 & n.3 (1st Cir. 1990) (finding it "beyond peradventure" that an "unadmitted and non-resident alien" may not obtain judicial review of denial of visa, but allowing suit by American citizens to address "the possibility of impairment of [their] First Amendment rights through the exclusion of the alien"); *Abourezk* v. *Reagan*, 785 F.2d 1043, 1050-51 & n.6 (D.C. Cir. 1986) (allowing American citizens to challenge denial of visas to foreigners they invited to speak in the United States), *aff'd on other grounds by an equally divided Court*, 484 U.S. 1 (1987) (per curiam); *see also Chiang* v. *Skeirik*, 582 F.3d 238, 242-43 (1st Cir.

2009) (suit by citizen claiming that denial of visa to fiancé violated constitutional right to marry).

2. In permitting limited judicial review in the rare case where the denial of a visa implicates the constitutional rights of an American citizen, the Ninth Circuit and other circuits have faithfully followed this Court's decision in *Mandel*. Mandel was a self-described "revolutionary Marxist" who was denied a visa to travel to the United States to attend a conference and speak at universities because the consular official found he advocated for "world communism," a statutory ground for denial of a visa. 408 U.S. at 755-57. The Attorney General declined to grant him a waiver.

Mandel and college professors who invited him to speak filed suit, alleging that the visa denial violated the First Amendment. This Court found it "clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country." *Id.* at 762. But the Court also found that the visa denial implicated the professors' First Amendment right to "'receive information and ideas,'" *id.*, even though the Court recognized that the professors also could receive Mandel's ideas "through his books and speeches," or "tapes and telephone" without his physical presence in the United States, *id.* at 765. While it was similarly true that the professors could have traveled abroad in order to communicate with Mandel in person, the Court was "loath to hold on this record that existence of other alternatives *extinguishes* altogether *any* constitutional interest on the part of the appellees in *this particular form of access*." *Id.* (emphases added).

Significantly, this Court also declined the government's request for a "broad decision" that the Attorney General could act for "any reason or no reason" at

all. *Id.* at 769. Instead, the Court took a more measured approach. The Attorney General had declined to waive Mandel's ineligibility because, during a prior visit to the United States, Mandel had engaged in activities beyond the stated purpose of his trip. *Id.* at 759. Mandel had "accept[ed] more speaking engagements than his visa application indicated," and had spoken at a reception where money was raised for some French students who had engaged in political demonstrations even though he had "'assured the Consul by letter'" that he would "'not appear at any assembly in the United States at which money was solicited for any political cause.'" *Id.* at 758 n.5. The Court held that these "previous abuses" gave the Attorney General a "facially legitimate and bona fide reason" to deny Mandel another waiver, and affirmed that denial. *Id.* at 769-70. The Court held that when the Executive exercises authority conferred by Congress to exclude an alien "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

This Court has since held that U.S. citizens have a sufficient interest in the immigration of family members to trigger judicial review under the *Mandel* standard to the denial of visas and immigration preferences to certain family members. In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), this Court entertained a constitutional challenge brought by American citizens to an INA provision that denied special preference immigration status to natural fathers and their illegitimate children. This Court expressly *rejected* the government's contention that plaintiffs' constitutional challenge to the denial of visas to their family mem-

bers was "'not an appropriate subject for judicial review.'" *Id.* at 793 n.5. The Court explained that its "cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Id.; see also id.* at 795-96 n.6 (reiterating that Congress's broad authority to formulate immigration policy does not mean that "the Government's power in this area is never subject to judicial review").

To be sure, as the Government notes, this Court ultimately rejected the citizens' claims on the merits, and upheld Congress's exercise of its broad authority to determine which family-member classes of aliens should be admitted and excluded. *See* Pet. 17; *see also Fiallo*, 430 U.S. at 798-99. But the pertinent point here, which the government ignores, is that in *Fiallo* this Court not only affirmed that federal courts retain the power to hear a U.S. citizen's constitutional challenge to final agency action that excludes family members who wish to immigrate, but both acknowledged "that the families of putative immigrants certainly have an interest in their admission," *and* applied the "*Mandel*" standard of "limited judicial review" to that interest. 430 U.S. at 795, 795-96 n.6, 799.

The Ninth Circuit took the same measured approach in addressing Din's claim. In remanding for further proceedings in the district court, the Ninth Circuit expressly followed this Court's guidance in *Mandel* (Pet. App. 9a-10a, 13a-14a), acted consistently with *Fiallo*, and cautioned the district court to be responsive should the government raise national security concerns on the facts of this case. *Id.* at 20a-21a. As shown further below, neither the fact that this case involves a different constitutional right than

that at issue in *Mandel*, nor the fact that the consular official's visa denial here was not subsequently followed by an explanation of the denial of a waiver, is grounds for this Court's review.

II. THE NINTH CIRCUIT'S HOLDING THAT DENYING A VISA TO THE SPOUSE OF AN AMERICAN CITIZEN IMPLICATES THE CITIZEN'S FUNDAMENTAL RIGHT TO MARRIAGE AND FAMILY LIFE IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The government perfunctorily acknowledges that respondent has "a deeply rooted liberty interest in 'rights to marital privacy and to marry and raise a family.'" Pet. 14 (citing *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965)). The government nevertheless contends "that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to" her husband. *Id.* In the government's view, this case raises, "at bottom, an asserted constitutionally based liberty interest in having [an alien spouse] be present in the United States." *Id.* at 15-16. The government then argues that this narrowly defined interest is supported by "no history" and thus merits no constitutional protection whatsoever. *Id.* at 16.

The government's argument conflates two separate issues. The first is whether the Constitution provides some protection to an American citizen's choice of whether and where to live with her spouse; the second is whether that protection, if it exists, is sufficiently strong to outweigh a competing governmental interest that restricts that liberty. The distinction between the two questions is important and readily illustrated. The Court has long-recognized "that the

right to marry is of fundamental importance for all individuals", *Zablocki* v. *Redhail*, 434 U.S. 374, 384, 384-86 (1978), yet whether the government validly may restrict that liberty in a particular instance is a separate inquiry. *Id.* at 386-87; *see id.* at 392 ("Surely, for example, a State may legitimately say that no one can marry his or her sibling, or that no one can marry who has a living husband or wife.") (Stewart, J., concurring in the judgment). Such restrictions may overcome, but do not "extinguish[] altogether" (*Mandel*, 408 U.S. at 765), the liberty interest in marriage.

The threshold question here, therefore, is whether Din has a constitutionally protected liberty interest in choosing where to live with her spouse. This Court's prior decisions make clear that she does.

1. The government asserts that the denial of Berashk's visa does not implicate any liberty interest of Din's because it does not "nullify the marriage or deprive her of its legal benefits." Pet. 4-15 n.7. That argument ignores that "marriage is more than a routine classification for purposes of certain statutory benefits." *United States* v. *Windsor*, 133 S. Ct. 2675, 2692 (2013). It is an "intimate relationship between two people." *Id.* It is well-established that the marital relationship includes the choices of whether and where to live together.

Almost a century ago, this Court found "[w]ithout doubt" that the liberty protected by the Constitution includes the freedom "to marry, *establish a home*, and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added). In subsequent cases, the Court confirmed that this protection extends to many aspects of marital privacy for which the choices of whether and where to "establish a home" together are but a predicate.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), which the government claims not to challenge (Pet. 14), the Court found the rights of a married couple to use contraceptives to be inherent in the "constitutional rights of married people" and their right of privacy in their marriage. 381 U.S. at 481, 484-86. The right recognized in *Griswold* presupposed that "the marriage relationship" included the right to privacy and repose in the "the sacred precincts of marital bedrooms" because marriage was, at its core, "an association for as noble a purpose as any involved in our prior decisions." *Id.* at 485-86. *Griswold* necessarily recognizes a right to live with one's spouse; the dissent would have prevailed were the liberty interests in marriage limited to a recognition of legal status.[3]

The government also argues that there is "no history" to support a liberty interest in choosing where to live with one's spouse. Pet. 16. In the government's view, because Din may live with Berashk in Afghanistan, she has no constitutionally protected liberty interest at stake. That, too, is incorrect.

In *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), the Court relied on a "host of cases, tracing their lineage to *Meyer* v. *Nebraska*," to find a liberty interest in where a family (there, a grandmother, son, and grandsons) chooses to live. *Id.* at 499, 500-03 (plurality opinion); *id.* at 520 (Stevens, J., concurring in judgment on separate constitutional grounds (finding a deprivation of a property interest)). In so holding, the Court rejected the very ar-

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[3] *See also Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971) (fundamental right to marry includes right of access to courts to dissolve the marriage and thus vindicate the choice no longer to live with one's spouse).

gument the government raises here: that East Cleveland's ordinance could be upheld because it restricted only the grandmother's liberty "to live with all her children in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area." *Id.* at 550 (White, J. dissenting). In *Moore*, the Court thus held that the ability to exercise a constitutionally protected interest in some other jurisdiction does not negate the existence of that interest. Similarly, because marriage is "one of the basic civil rights of man'" *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (quotations omitted), there is no doubt that this Court would find a liberty interest at stake were the Commonwealth of Virginia to resurrect its anti-miscegenation policy with a law that allowed interracial couples to marry so long as they chose to live in a different state.

It is thus no answer for the government to say that Din can live "with her spouse anywhere in the world besides the United States." Pet. 14-15 n.7. Married people typically choose a place in which to "establish a home," and that choice is intrinsically part of the liberty interest in marriage that the constitution protects. The government's denial of Din's freedom to live with her spouse in this country thus implicates a constitutionally protected liberty interest. The Ninth Circuit therefore did not err in finding that the right to freedom of choice in marriage and family life is implicated when the government denies a visa to a citizen's alien spouse.

2. To recognize that a liberty interest exists is not to say that it is absolute or cannot be regulated by the government. "Of course, the family is not beyond regulation." *City of E. Cleveland*, 431 U.S. at 499 (plurality opinion). The states and federal government have long regulated the institution of marriage

and the rights and responsibilities it entails. *See, e.g., Windsor*, 133 S. Ct. at 2689-93. And when the government acts in "the exercise of its broad power over immigration," its regulatory authority is particularly strong. *Fiallo*, 430 U.S. at 792.

Nevertheless, the government still must have a rational reason for the regulation and for applying it to restrict a particular citizen's liberty interest. As *Mandel* and *Fiallo* make clear, citizens are entitled to limited judicial review to ensure that such a reason exists. *See Mandel*, 408 U.S. at 770; *Fiallo*, 430 U.S. at 795-99 (applying standard of review drawn from *Mandel* and rejecting due process challenge to denial of preferential visas for illegitimate children and their natural fathers). Where the government has a legitimate and bona fide reason to exclude an alien spouse, it may do so notwithstanding the spouse's liberty interest. *See Bustamante*, 531 F.3d at 1062-63 (applying *Mandel* and denying spouse's claim that government's explanation for visa denial was insufficient to satisfy due process).

It is thus a gross exaggeration for the government to say that the Ninth Circuit's decision could have "sweeping consequences." Pet. 17. The government cites few cases involving challenges to the denial of a visa to an alien spouse, and in all prior appellate decisions the spouse has received notice consistent with *Mandel*. As for removal proceedings, the government not only must provide the alien with written notice of the statutory grounds for removal and the acts or conduct by the alien that allegedly violate the law, but allow the alien a hearing before an administrative law judge to contest those grounds. 8 U.S.C. §§ 1229(a)(1), 1229a. These procedures exceed what

Mandel requires and ensure that a spouse will know the reasons for removal.[4]

3. The decision below does not conflict with the Sixth Circuit's decision in *Bangura*, with the Second Circuit's decision in *Burrafato*, or with any of the circuit court decisions holding that the removal of an alien does not violate any liberty interest of the alien's citizen spouse. Pet. 18-21. None of these cases addressed or decided the issue presented here. The government suggests otherwise only by quoting sentences out-of-context that, like the Petition itself, conflate the existence of a liberty interest with the separate issue of whether the government has shown valid grounds for denying a visa or deporting a spouse.

In *Bangura*, the Immigration and Naturalization Service ("INS") advised Mr. Bangura in writing that it was denying his immigration petition for his alien spouse because his spouse had "'entered into a prior marriage for the purpose of evading the immigration laws'" and hence "'is statutorily ineligible for the benefit sought.'" *Bangura*, 424 F.3d at 492 (emphasis omitted) (quoting INS letter ruling). The Sixth Circuit recounted in some detail the facts underlying the INS's determination. *Id.* The Sixth Circuit thus never had occasion to address whether "the fundamental right to marriage" (*id.* at 493) would have allowed the INS to deny Mr. Bangura's petition without any ex-

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[4] The government also finds it "difficult to see why children would not have a constitutional right to object to a parent being sent to prison" (Pet. 18), but children certainly would have such a right were a parent summarily imprisoned without explanation; of course, if the parent was first convicted pursuant to the procedures due process requires, then any *Mandel*-lawsuit would be pointless because the government already would have provided far more than a facially legitimate and bona fide reason for the imprisonment.

planation of why his spouse was "statutorily ineligible," because Mr. Bangura had already received ample explanation of why the visa was denied. *Bangura* instead addresses a broader issue, not raised here, of whether the fundamental right to marriage trumps an exclusion decision made for a facially legitimate and bona fide reason that satisfies *Mandel*.

The same is true of the nearly 40-year old Second Circuit decision in *Burrafato*. There, too, the Second Circuit had no occasion to address a U.S. citizen's demand for an explanation that would satisfy *Mandel*, because the government provided that explanation in an "affidavit" filed with the district court stating that the denial was based on the alien spouse's "'association with organized criminal society'" and citing the specific subsection of section 212(a) under which he was excludable. 523 F.2d at 556 n.3. Any claim the spouse may have brought under *Mandel* was thus moot on appeal, and so the Second Circuit's discussion of her constitutional right to marry was limited to her broader argument that her right was "violated by deportation of her alien spouse." *Id.* at 555. The Second Circuit summarily rejected that broad claim, which is not at issue here.

The remainder of *Burrafato* addressed claims of denial of due process in connection with the deportation proceedings of the alien spouse. These claims also are irrelevant here, not only because the appellants knew why his visa was denied, but because the Second Circuit expressly noted that no challenge was raised to the consular official's denial of the visa, *id.* at 555 n.2 (appellants do not seek "review of the denial of the visa application by the United States Consul in Palermo on grounds of lack of due process"). In a subsequent Second Circuit case, where American citizens *did* challenge a consular official's denial of a

visa to an alien, the Second Circuit agreed with all other courts to have addressed the issue and held that a visa denial is reviewable under *Mandel*. *Am. Acad.*, 573 F.3d at 124-25.

The decisions in *Bangura* and *Burrafato* thus do not address the issues presented here. Instead, they reject a different and far broader right than Din has claimed, one to have their spouses be allowed to stay in the United States notwithstanding the government's stated reason for excluding or deporting them. *See Bangura*, 434 F.3d at 495-96 (the "'Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country'" when the spouse previously and fraudulently attempted to immigrate via marriage); *Burrafato*, 523 F.3d at 555 & n.2, 556 & n.3 (holding that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse" where spouse had entered America illegally, been denied a visa due to organized crime activity, and did not challenge the consular official's visa denial).

The government cites to other deportation cases (Pet. 20-21), but in these cases the U.S. citizen did not raise, and the courts did not address, whether the citizen was entitled to an explanation for removal consistent with *Mandel*. Instead, the courts rejected attempts by citizens to prevent altogether the removal of their spouses (or parents) on the ground that the removal infringed the citizens' liberty interests in marriage and family life. *See Oforji* v. *Ashcroft*, 354 F.3d 609, 617-18 (7th Cir. 2003) (rejecting argument that the "potential hardship to citizen children arising from the mother's deportation should allow an otherwise unqualified mother to append to the children's right to remain in the United States"); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982) (affirm-

ing denial of writ of habeas corpus to set aside a final order of deportation because, among other grounds, "Mrs. Garcia and the children cannot use their citizenship to stop the deportation of Mr. Garcia"); *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (reversing district court injunction against commencement of deportation proceedings and rejecting argument that deportation violates citizen spouse's right to marry); *Swartz* v. *Rogers*, 254 F.2d 338, 338-39 (D.C. Cir. 1958) (affirming denial of injunctive relief against order of deportation of an alien who was convicted of a violation of the Narcotics Act because "the wife has no constitutional right which is violated by the deportation of her husband").

There obviously is no conflict between any of these decisions and the Ninth Circuit's decision below. A finding that the right to marriage is not "so protected by the due process clause of the Fifth Amendment that [a spouse] could not be deported" pursuant to a valid act of Congress, *Swartz*, 254 F.2d at 339, is qualitatively different than a finding that the right to marriage is not implicated at all, and that the government has unreviewable discretion to deny a spousal visa for any reason, regardless of how arbitrary or improper it may be, and without any role for judicial review.

This is precisely the distinction this Court drew in *Mandel*. Because the Court found that the citizens' "First Amendment rights are *implicated*," it subjected the government's reason for infringing those rights to limited judicial review, and refused to accept the government's argument that the Executive could deny the visa "in its sole and unfettered discretion" for "any reason or no reason." *Mandel*, 408 U.S. at 765, 769 (emphasis added). The Ninth Circuit's decision follows *Mandel*, much as this Court did in *Fiallo*,

when the denial of a visa implicates a citizen's freedom of choice in marriage and family life. No further review is warranted.

III. NOTHING ABOUT THE NINTH CIRCUIT'S APPLICATION OF *MANDEL* TO THIS PARTICULAR DENIAL OF A VISA PRESENTS AN IMPORTANT QUESTION REQUIRING THIS COURT'S REVIEW.

Finally, the government's concerns that the Ninth Circuit has applied *Mandel* to a case that involves a consular official's denial of a visa, and not the Attorney General's explanation for denying a waiver, and the government may be required to disclose sensitive information in the future, provide no ground for further review.

1. The government claims that the Ninth Circuit misread *Mandel* to apply to a consular official's denial of a visa. Pet. 21. According to the government, this Court merely "assumed (but did not hold) [in *Mandel*] that if a citizen's First Amendment rights were implicated, then that citizen could obtain review of a discretionary denial by the Attorney General of a waiver of the grounds" for the denial, and the Court did not address whether the Attorney General was constitutionally required to furnish a "facially legitimate and bona fide" reason. *Id.* at 22 (quotations omitted). These arguments provide no basis for further review by this Court.

First, the government never questioned below that Din could obtain limited judicial review under *Mandel* if she could demonstrate a "cognizable constitutional interest in the visa denial."[5] Appellees' An-

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[5] The government's opposition to review was based instead on its assertion that the denial of the visa did not implicate any

swering Br. at 1, *Din* v. *Clinton*, No. 10-16772 (9th Cir. Mar. 4, 2011). In both the initial briefing to the panel and the petition for rehearing en banc, the government accepted the proposition that if Din "has a cognizable constitutional interest in the visa denial," then "the denial is subject to a limited juridical inquiry to determine whether it is 'facially legitimate' and '*bona fide*.'" *Id.*; *see also* Petition for Rehearing En Banc at 4. The government's argument that *Mandel* is limited to cases where the Attorney General has provided an explanation for denying a waiver thus was never presented below.

Second, the government's argument has not persuaded any other appellate court. This Court, over the government's objection, used *Mandel* as its point of departure in *Fiallo*, and no appellate court has read *Mandel* as limited to its unique facts. On the contrary, courts have read *Mandel* to authorize limited judicial review to determine whether there was a facially legitimate and bona fide reason for denying a visa that implicates the constitutional rights of an American citizen, and have done so when the plaintiff challenged only the consular official's decision to deny the visa. *See Am. Acad.*, 573 F.3d at 124 (agreeing with *Bustamante* and explaining that "[i]t seems counterintuitive to review a cabinet officer's discretionary decision, but not a consular officer's decision as to statutory ineligibility."); *Adams*, 909 F.2d at 647-50; *Allende* v. *Shultz*, 845 F.2d 1111, 1114-21 (1st Cir. 1988); *Abourezk*, 785 F.2d at 1050. As the Ninth Circuit explained in *Bustamante*, the decision in

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constitutional right, and that the consular official's statement that the denial was based on terrorism-related grounds under 8 U.S.C. § 1182(a)(3)(B) constituted a "'facially legitimate and bona fide reason.'" Appellees' Answering Br. at 13-21; Petition for Rehearing En Banc at 6-13.

Mandel is phrased in terms of the "power delegated by Congress to 'the Executive.'" 531 F.3d at 1062 n.1. As consular officials serve in the executive branch, there is no reason "the outcome should vary according to which executive officer is exercising the Congressionally-delegated power to exclude." *Id.* Those decisions are correct, and comport with this Court's subsequent decisions on judicial review of claims that executive agencies have exceeded constitutional bounds. Even in the area of immigration law, this Court has been reluctant to interpret federal statutes as precluding judicial review of constitutional challenges to agency actions. *See McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-99 (1991).

Third, reading either *Mandel* or the INA to preclude judicial review of a consular official's visa-denial would be extraordinary. The government makes no claim that the INA itself precludes judicial review of such an action. Rather, it claims that the statute does not expressly authorize such judicial review, and that "in the absence of affirmative congressional authorization," the judge-made doctrine of consular nonreviewability bars review. Pet. 5-6. That doctrine, however, evolved in the context of demands by aliens, not U.S. citizens. Where citizens raise constitutional claims concerning the denial of family visas, this Court has provided review. *See Fiallo* v. *Bell*, 430 U.S. at 793 n.5, 795-96 n.6, discussed at pages 14-15, *supra*.

2. The government also complains that, by requiring the government to do more than merely cite the statute that authorizes a consular official to deny a visa to those who engage in certain "terrorist activities," the Ninth Circuit has overstepped the limited bounds permitted for judicial review. Pet. 23-24.

This argument also provides no basis for granting the Petition.

The Ninth Circuit correctly recognized that by citing a statutory provision that allows for exclusion, the government merely establishes that Congress has provided the government with some authority to deny a visa. It is one thing for the Executive to have such authority, however, and another for it to have a facially legitimate and bona fide reason to invoke it in a given case. Pet. App. 9a. Requiring the government to provide an explanation sufficient to satisfy the *Mandel* standard in no way exceeds what procedural due process requires. Without some minimal explanation of the sort given in *Mandel* and other cases, a court cannot provide judicial review of any kind. Pet. App. 9a-20a.

The government notes that the statute does not require the consular official to provide the alien with written notice of the determination and the statutory provision on which the official relied if the official deems the alien inadmissible under section 1182(a)(2) (criminal-related grounds) or section 1183(a)(3) (security-related grounds). Pet. 24-25. That would be a sufficient answer if petitioner were an alien; it is insufficient when a U.S. citizen seeks an explanation consistent with this Court's limited grant of review in *Mandel*.

The government also cites *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), and *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), which upheld the authority of the Attorney General to deny entry to an alien whose admission he deemed prejudicial to the interests of the United States based on confidential information and without a hearing. Pet. 25-26. Those cases, however, were brought solely by aliens who were outside the United

States and had no right to enter the country. *See Mezei*, 345 U.S. at 208, 210-12; *Knauff*, 338 U.S. at 539, 542. For those aliens, "'[w]hatever the procedure authorized by Congress is, it is due process'" *Mezei*, 345 U.S. at 212 (quoting *Knauff*, 338 U.S. at 544). But citizens and aliens who are in the United States stand on a "different footing." *Id.* Citizens have rights that may be restricted "only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* The complete denial of due process that this Court has deemed acceptable for aliens abroad is thus not applicable to claims brought by U.S. citizens.

As explained above, Din's right, as an American citizen, to freedom of choice in marriage and family life was implicated by the consular official's denial of the visa she petitioned for on behalf of her alien husband. Thus, due process requires at least that there be a facially legitimate and bona fide reason for denying the visa and infringing upon Din's right. *See supra* at pages 16-20. The government responds that it need not state the reason for the consular official's decision because "by definition" the reason must be "tethered" to the statutory grounds for ineligibility, and those grounds were enacted by Congress and thus "are legitimate on their face by their very nature." Pet. 22-23. That ignores, however, that due process requires more than a rational basis for the statute. It also requires that government officials who implement the statute have some reason for finding that the standards are met in individual cases. *See, e.g.*, *Superintendent* v. *Hill*, 472 U.S. 445, 455 (1985) ("a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence"); *Schware* v. *Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957) ("Even in ap-

plying permissible standards, officers of a State" cannot infringe a liberty interest without a factual basis).

The government's assertion that it need not identify the specific statutory provision or any facts on which the visa application was denied is incompatible with not only with that due process principle, but with any semblance of judicial review of the constitutionality of visa denials. As the panel majority explained, the statute "contains ten subsections identifying different categories of aliens who may be inadmissible for terrorism reasons," defines "terrorist activities" differently in different subsections, and provides for some categories a right to present rebuttal evidence. Pet. App. 11a-13a. A court cannot provide even the most limited judicial review of whether a visa denial is "tethered to the legal provisions that" authorize denial (Pet. 22) without having the government identify the subsection it thinks applies and "at least allege what it believes Berashk did that would render him inadmissible" under that subsection. Pet. App. 12a, 14a. Only then could the court look at (but not "behind") the government's reason for denying the visa to determine if it is facially legitimate and bona fide under *Mandel* and *Fiallo*. *Compare* Pet. 26-27, *with* Pet. App. 13a-14a.

3. Finally, the government claims that the Ninth Circuit "mandated" disclosures that "could compromise classified or other sensitive information" or "have a chilling effect on the sharing of national security information among federal agencies and between the United States and foreign countries." Pet. 27-28. The government "never asserted" in this case, however, that national security reasons preclude giving an explanation that comports with *Mandel*. Pet. App. 20a. Instead, the government generally alleges that "information supporting a visa denial" on security-

related grounds is "often classified" or related to "sensitive ongoing" investigations such that any requirement of disclosure, in any case, is unwarranted. Pet. 27.

The Ninth Circuit opinion addressed the government's general concerns, however, and the Petition says little in response. The government does not deny, for example, either that "consular officials appear to regularly disclose information to aliens" who are excluded under section 1182(a)(2) or (a)(3) (Pet. App. 16a), or that the U.S. Department of State Foreign Affairs Manual explicitly directs consular officials to provide written explanations to aliens excluded in "'all cases'" under sections 1182(a)(2) and (a)(3), and to do so even though the INA does not require such explanations, unless a superior instructs them otherwise (*id.* at 17a n.6).

While noting the "dearth of cases" in which the issue arises (Pet. App. 8a n.2), the Ninth Circuit nonetheless emphasized that "nothing in our opinion compels dangerous disclosure." *Id.* at 20a. It described how the few other cases involving denials under section 1182(a)(2) or (a)(3) requiring *Mandel* review had been resolved without problematic disclosures of confidential information (*id.* at 9a-10a, 12a-13a), and explained that, if the government does raise a national security concern with respect to Berashk's denial on remand, the district court should respond with appropriate safeguards, such as having the government disclose its reasons *in camera*, as it does in criminal and FOIA litigation in which highly sensitive classified information is at issue. *Id.* at 21a.

The government's speculation that the courts' established procedures for dealing with classified information might increase the risk of "unauthorized or inadvertent disclosure" (Pet. 30) provides no reason

for this Court to grant certiorari now. This case is in an interlocutory posture and the government created no record below that *in camera* procedures would be needed, let alone that they would not suffice. If that changes on remand, and the government is uncomfortable with the risk entailed with the procedures for *in camera* review or other steps or disclosures the district court might provide or require, it can decline to provide the information to the district court, and there will be ample opportunity to address that issue on appeal of a final judgment.

A question that arises so rarely, is consistent with this Court's decisions, does not involve a circuit split, and is interlocutory and may be dealt with adequately on remand by well-established processes such as *in camera* review, does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 25, 2014

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REPLY BRIEF

No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, ET AL.,
PETITIONERS

v.

FAUZIA DIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit held in this case that respondent, a U.S. citizen, has a fundamental liberty interest that is implicated by a consular officer's denial of her alien spouse's visa application. On that basis, the court of appeals—purporting to apply this Court's decision in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1971)—required the government to provide respondent with a detailed explanation of the factual and statutory grounds for that denial, thereby circumventing the statute (8 U.S.C. 1182(b)(3)) that shields the government from giving notice to the alien himself of the basis for the denial when it is related to terrorism or criminal activity. As the petition explains, that decision is incorrect, and it cannot be reconciled with decisions of this Court or of other courts of appeals. Respondent's defense of the Ninth Circuit's decision on the merits is seriously flawed, and her attempt to paper over the

conflict in authority fails. She also greatly underestimates the threat to national security and foreign relations that Congress recognized in enacting 8 U.S.C. 1182(b)(3). The petition for a writ of certiorari therefore should be granted.

A. Whether a U.S. Citizen Has A Protected Liberty Interest Implicated By Denial Of An Alien Spouse's Visa Application Warrants This Court's Review

1. Contrary to respondent's contentions (Br. in Opp. (Opp.) 16-21), the court of appeals erred in ruling that a U.S. citizen has a fundamental liberty interest implicated by denial of her alien spouse's application for a visa. Spouses are independent human beings responsible for their own actions and for establishing their own eligibility for government benefits such as admission to the United States. The Immigration and Nationality Act confers no legally cognizable interest on a U.S. citizen if her alien spouse abroad is denied a visa because a consular officer has found him statutorily ineligible on terrorism or other grounds. A fortiori the Due Process Clause itself does not confer such a liberty interest on a U.S. citizen.

This Court has made clear that "a careful description of [an] asserted fundamental liberty interest," *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted), is required to ascertain whether the interest is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Reno* v. *Flores*, 507 U.S. 292, 303 (1993) (quoting *United States* v. *Salerno*, 481 U.S. 739, 751 (1987)). Respondent says that she "has a constitutionally protected liberty interest in choosing where to live with her spouse" (Opp. 17), and cites in support various cases finding that U.S. citizens have a

liberty interest in marrying, raising a family, and deciding where in the United States they wish to live with other U.S. citizens (Opp. 17-18). But her description of her asserted interest is vague and general, not "careful" and contextual. None of the marriage-related decisions on which she relies has anything to do with the liberty interest she asserts in "the ability to live in the United States with an alien spouse," Pet. App. 7a n.1, and therefore to have the alien spouse admitted to the United States for that purpose. Congress's plenary control over the admission of aliens compels the conclusion that the asserted right cannot be deemed fundamental. See Pet. 16-17; see also, *e.g.*, *Morales-Izquierdo* v. *Department of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010) (recognizing that an alleged right for an alien to reside with U.S.-citizen family members "is one far removed from the right of United States citizens to live together as a family espoused in [*Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977)]"); see generally *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (with respect to congressional prerogatives over admission of aliens, there is "not merely a page of history, but a whole volume") (internal quotation marks and citation omitted).[1]

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[1] Respondent erroneously relies (Opp. 14-15, 20) on *Fiallo* v. *Bell*, 430 U.S. 787 (1977). As the petition states, *Fiallo*—which involved a number of different constitutional challenges to statutory provisions, not review of a consular officer's individualized decision—rejected the proposition that U.S. citizens have a "fundamental right" to be united in this country with their alien family members, describing that notion as a "fallacy." *Id.* at 794-795 & n.6; see Pet. 17. While *Fiallo* recognizes that Congress's decisions embodied in immigration statutes are not always immune from judicial review, it contains not a line suggesting the existence of a fundamental liberty interest in marriage that extends to having

That analysis does not, as respondent insists (Opp. 16-17), erroneously conflate the question of the existence of an asserted liberty interest with the question of the strength of the government's regulatory interest. Rather, it recognizes that where the government's regulatory powers have "tradition[ally]" been absolute, as is true of the admission of aliens, the asserted interest could never have taken sufficient "root[]" to be recognized as fundamental. *Flores*, 507 U.S. at 303 (citation omitted); see generally *Mandel*, 408 U.S. at 770 (stating that in the visa context there is no call to "balanc[e]" the government's "justification" for its action against the interests of a U.S. citizen).

2. The Ninth Circuit's erroneous decision conflicts with the decisions of several other courts of appeals on the liberty-interest issue, and respondent's arguments to the contrary (Opp. 21-23) are incorrect.

First, respondent mischaracterizes the Second Circuit's decision in *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976). There, the Second Circuit first held that "the claim that denial of [the alien's] visa application violated the constitutional rights of [the U.S. citizen spouse]" was "foreclosed" by circuit precedent. *Id.* at 555. The court of appeals then addressed whether "the failure of the Department of State * * * to specify the reasons for denial of [the alien's] visa application denied [the alien] procedural due process." *Ibid.* The court held that it did not. And although the alien's U.S.-citizen spouse was also one of the plaintiffs, the court of appeals distin-

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one's alien spouse live in the United States. See 430 U.S. at 793-795 & nn.5-6; see also *id.* at 798.

guished *Mandel* on the ground that "no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated.'" *Id.* at 556-557.

That decision is therefore in direct conflict with the Ninth Circuit's decision here. Respondent's argument that the alien in *Burrafato* already "knew why his visa was denied" (Opp. 22) is wrong; the alien and his spouse claimed that he had not been given an adequate reason under *Mandel*, and the reason provided to him was no more specific than the reason respondent's alien spouse was given here. See *Burrafato*, 523 F.2d at 556 n.3 ("association with organized criminal society"). Respondent's assertion that "no challenge was raised to the consular officer's denial of the visa" in *Burrafato* (Opp. 22) is misleading; the challenge raised was to an allegedly insufficient reason for the visa denial, 523 F.2d at 555 & n.2, the same challenge as in this case. And respondent's statement that "a subsequent Second Circuit case" came out a different way (Opp. 22) is entirely off point, because that case involved a direct assertion of U.S. citizens' own First Amendment interests and not an asserted due process right of a U.S. citizen to notice of the factual and legal basis for the denial of a visa to her alien spouse. See *American Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 124-125 (2d Cir. 2009).

Second, respondent's attempt (Opp. 21-22) to narrow the decision in *Bangura* v. *Hansen*, 434 F.3d 487 (6th Cir. 2006), to its facts is unavailing. In *Bangura*, the Sixth Circuit rejected the argument that a U.S. citizen and his alien spouse had a fundamental marriage-related right that entitled them to challenge on due process grounds the government's denial of the

U.S. citizen's visa petition on behalf of the alien spouse. See *id.* at 496. Contrary to respondent's assertion, the court of appeals did not rest its ruling on the exact nature of the review that the plaintiffs sought or on some weighing of the government's interest against the plaintiffs' interests; rather, the court flatly concluded that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." *Ibid.* (internal quotation marks and citation omitted); see *ibid.* ("A denial of an immediate relative visa does not infringe upon their right to marry."). The fact that the government provided a more detailed rationale for the denial of the visa petition in *Bangura* than it provided for the denial of the visa application in this case is therefore irrelevant. *Bangura* rejected the very liberty interest that the Ninth Circuit recognized in this case.[2]

3. Although respondent suggests (Opp. 20) that the Ninth Circuit's constitutional holding, if allowed to stand, would have limited effects, its implications are in fact "sweeping." Pet. 17. It would permit any U.S. citizen to claim that her constitutional rights have been violated by a physical separation from an alien family member—even where, as here, the alien himself has no cognizable rights in the matter, see

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[2] The same is true of the cases cited in the petition (Pet. 20-21) reaching that result in the removal context. Those cases did not turn on whether the U.S. citizen asserting the interest asked for "an explanation for removal consistent with *Mandel*" (Opp. 23) or some more searching inquiry. See, *e.g.*, *Oforji* v. *Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) ("The law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion or deportation."); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982); see also Pet. 20-21.

Zadvydas v. *Davis*, 533 U.S. 678, 693 (2001). That would work a sea change in the law, creating obstacles to the government's exercise of its plenary power over the Nation's borders and burdening the courts.

B. Whether A Consular Officer's Visa Determination Is Subject To Judicial Review And Notice Requirements Warrants This Court's Review

1. As the petition explains (Pet. 27-30), the Ninth Circuit's decision mandates a disclosure that would permit plaintiffs like respondent and their alien spouses to obtain information not only about the legal basis for a terrorism-related denial of a visa to the alien spouse but also about the "facts" of "what the consular officer believes the alien has done." Pet. App. 9a, 14a. Those facts are often classified or otherwise sensitive, and disclosure would have a chilling effect on the willingness of various agencies and foreign governments to share with the Department of State the kind of intelligence that allows consular officers to prevent terrorists from obtaining visas. See, *e.g.*, 8 U.S.C. 1105(a).

Respondent protests (Opp. 31) that consular officers sometimes do disclose information to aliens whose visas are denied for terrorism-related (or crime-related) reasons. But that hardly suggests that the Constitution *requires* the government to make a particularized disclosure in every case in which a U.S.-citizen family member demands one, including cases in which it is the view of those who are familiar with intelligence reporting and terrorism trends and patterns that such a disclosure would cause harm to national security or foreign relations. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010). When disclosure of information to the alien is made, it

reflects a considered determination that the information provided in the particular case—such as the limited information given to respondent's alien spouse in this case, see Pet. App. 17a—does not require invoking the protections of Section 1182(b)(3).

Respondent also contends (Opp. 31-32) that "established procedures" for handling classified information are sufficient to ameliorate any concerns and that the issue would arise in only a small number of cases. Neither contention is correct. There are no "established procedures" for mandated disclosures in this setting, and the Ninth Circuit did not attempt to identify any. The decision below therefore could heighten the risk of unauthorized or inadvertent disclosure of classified or sensitive terrorism-related information pertaining to aliens abroad who have no rights under the United States Constitution concerning their admission. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210-215 (1953). As the petition states (Pet. 30), a significant number of visa applications every year could be affected—and the number of claims like respondent's could be expected to increase significantly if the decision below were permitted to stand.

2. The Ninth Circuit's ruling that further disclosure was required in this case flies in the face of this Court's precedents. Respondent's defense of that ruling (Opp. 25-30), which persistently overstates the scope of the narrow holding in *Mandel* (see, *e.g.*, *id.* at 24, 28), is unsound.

a. *Mandel* addressed the Attorney General's discretionary denial of a waiver of an alien's inadmissibility after the alien was found by a consular officer to be ineligible for a visa, and did not involve review of the

consular officer's underlying finding of ineligibility. Even in that waiver context, the Court did not hold that the Attorney General was required to furnish a "facially legitimate and bona fide reason" for denial of the waiver. See Pet. 22-23 (citing *Mandel*, 408 U.S. at 769-770). The Court found it unnecessary to reach that question because such a reason in fact appeared in the record. In this case, because the visa application submitted by respondent's alien spouse was denied on the basis of a non-discretionary reason set forth in 8 U.S.C. 1182(a)(3) itself, *Mandel* neither requires any further inquiry into whether the reason was "facially legitimate and bona fide" nor suggests the need for any additional justification.[3]

Respondent also contends (Opp. 27; see *id.* at 28, 30) that *Mandel* must be read to require that she have a right to some judicial review of the denial of a visa to her husband abroad, because any other result would be "extraordinary." That is exactly backwards. It has long been the case that a consular officer's visa decision is presumptively unreviewable. See *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) ("When it comes to matters touching on national security or foreign affairs—and visa determinations

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[3] Respondent asserts (Opp. 25-26) that the government did not previously argue that she cannot obtain review under the rationale of *Mandel* even if she demonstrates that she has some cognizable constitutional interest. The government's arguments below were constrained by the Ninth Circuit's earlier decision in *Bustamante* v. *Mukasey*, 531 F.3d 1059 (2008), which incorrectly applied *Mandel* to a visa-denial decision, see *id.* at 1060, 1062. In any event, the government did take the position that the disclosure respondent sought was not justified by this Court's decision in *Mandel*, and the argument in the text concerning review of the ineligibility determination is a subset of that broader argument.

are such matters—the presumption of review 'runs aground.'") (quoting *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988)); see also, *e.g.*, *Mezei*, 345 U.S. at 210, 212. In seeking to circumvent consular nonreviewability and expand the very limited holding of *Mandel* to cover the very different circumstances of this case, it is respondent who seeks an "extraordinary" result.

b. Even if *Mandel* were applicable to the visa denial in this case, the Ninth Circuit erred in holding that the government must provide respondent with the factual basis for the denial and the specific subsection of Section 1182(a)(3)(B) that authorized that decision. *Mandel* emphasized that a court should not "look behind" a visa-related determination, 408 U.S. at 770, and other decisions of this Court recognize that the government is entitled to shield information relating to the entry of aliens that "would itself endanger the public security," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)—the same concerns underlying Section 1182(b)(3).

Respondent argues (Opp. 30) that the disclosure required by the Ninth Circuit does not impermissibly "look behind" the government's visa-denial decision, but merely enables some "semblance of judicial review." In the same breath, however, respondent insists that a consular officer's decision must be supported by "evidence" so that a court can be certain that the government had a reason to believe that the statutory standard for inadmissibility was satisfied. Opp. 29 (quoting *Superintendent* v. *Hill*, 472 U.S. 445, 455 (1985)). It is the latter statement that characterizes what the Ninth Circuit required in this case: information that would allow a court to "verify" the

ground for exclusion. Pet. App. 14a. That is exactly the kind of task as to which "the lack of competence on the part of the courts is marked" and "respect for the government's conclusions is appropriate." *Humanitarian Law Project*, 561 U.S. at 34 (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981)). Even if *Mandel* required some opportunity for judicial review in this case, the government's statement to respondent's alien spouse that he was inadmissible on terrorism-related grounds is a sufficient basis for a court to assess the visa denial for facial legitimacy. The far more searching review mandated by the Ninth Circuit is impermissible.

Respondent also characterizes as irrelevant (Opp. 28-29) any authority that relates to a request for information by an alien rather than by a U.S. citizen. But this Court's decisions in *Mezei* and *Knauff*, and the restrictions on disclosure that Congress set forth in Section 1182(b)(3), vividly demonstrate that the due process right granted by the Ninth Circuit in this case amounts to an end-run around restrictions that apply to the alien himself—restrictions that are grounded in security concerns too vital to be so easily circumvented.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2014

JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 26 2014
OFFICE OF THE CLERK

No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY, ET AL., PETITIONERS

v.

FAUZIA DIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: MAY 23, 2014
CERTIORARI GRANTED: OCT. 2, 2014

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 10-16772

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

JOHN F. KERRY, SECRETARY OF STATE; JANET A. NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES; RICHARD OLSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; CHRISTOPHER RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; JAMES B. CUNNINGHAM, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/10	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 08/19/2010. Transcript ordered by 09/10/2010. Transcript due 10/11/2010. Appellant Fauzia Din opening brief due 11/19/2010. Appellee Hilary Clinton, Appellee Karl

DATE	DOCKET NUMBER	PROCEEDINGS
		W. Eikenberry, Appellee Eric H. Holder Jr., Attorney General, Appellee Janet Napolitano, Appellee Anne Patterson and Appellee Christopher Richard answering brief due 12/20/2010. Appellant's optional reply brief is due 14 days after service of the answering brief. [7438008] (RT)
8/19/10	2	Filed (ECF) Appellant Fauzia Din Mediation Questionnaire. Date of service: 08/19/2010. [7445633] (HCL)
9/8/10	3	Filed (ECF) notice of appearance of Stacey Ilene Young for Appellees Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr., Janet Napolitano, Anne Patterson and Christopher Richard. Date of service: 09/08/2010. [7466839]—[COURT UPDATE: Replaced PDF with correctly completed form; resent notice. 09/08/2010 by ASW] (SIY)
9/8/10	4	Added attorney Stacey Ilene Young for Christopher Richard, Eric H. Holder Jr., Karl W. Eikenberry, Hilary Clinton, Janet Napolitano, Anne Patterson, in case 10-16772. [7467550] (ASW)
9/24/10	5	Terminated Theodore Roethke for Fauzia Din in 10-16772 [7485682] (ASW)

DATE	DOCKET NUMBER	PROCEEDINGS
10/6/10	6	Filed (ECF) notice of appearance of Sin Yen Ling for Appellant Fauzia Din. Date of service: 10/06/2010. [7499550] (SL)
10/6/10	7	Added attorney Sin Yen Ling for Fauzia Din. [7499760] (RL)
10/8/10	8	Filed order MEDIATION (VLS): This case is under consideration for inclusion in the Mediation Program. Within 14 days of the date of this order, counsel for all parties to this appeal are requested to inform Circuit Mediator Ann Julius of their clients' views on whether This communication shall not be served on the opposing party and shall not be filed with the court. The existing briefing schedule remains in effect pending the determination whether the case will be selected for inclusion in the Mediation Program. [7503205] (WL)
11/15/10	9	Filed (ECF) Appellant Fauzia Din Motion to extend time to file Opening brief until 11/15/2010 at 02:37 pm. Date of service: 11/15/2010. [7545758] (SL)

DATE	DOCKET NUMBER	PROCEEDINGS
11/17/10	10	Filed clerk order (Deputy Clerk: LBS): Appellant's unopposed motion for an extension of time to file the opening brief is granted. The opening brief is due December 20, 2010; the answering brief is due February 18, 2011; and the optional reply brief is due within 14 days after service of the answering brief. [7548351] (WL)
12/17/10	11	Filed (ECF) notice of appearance of Heidi C. Larson for Appellant Fauzia Din. Date of service: 12/17/2010. [7584588] (HCL)
12/17/10	12	Added attorney Geoffrey D. DeBoskey for Fauzia Din. [7584787] (RL)
12/17/10	13	Terminated David S. Elkins for Fauzia Din. [7584797] (RL)
12/20/10	14	Submitted (ECF) Opening brief for review. Submitted by Appellant Fauzia Din. Date of service: 12/20/2010. [7587186] (HCL)
12/21/10	15	Filed clerk order: The opening brief [14] submitted by Fauzia Din is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief

DATE	DOCKET NUMBER	PROCEEDINGS
		is identical to the version submitted electronically. [7587678] (LA)
12/22/10	16	Received 7 paper copies of Opening brief [14] filed by Fauzia Din. [7590896] (SD)
12/23/10	17	Filed Appellant Fauzia Din excerpts of record in 1 volume. Served on 12/20/2010. [7592300] (LA)
1/13/11	18	Filed order MEDIATION (AJ): The court has determined that this appeal will not be selected for inclusion in the Mediation Program. [7612245] (WL)
2/14/11	19	14 day oral extension by phone of time to file Appellees Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr., Janet Napolitano, Anne Patterson and Christopher Richard brief. Appellee Hilary Clinton, Appellee Karl W. Eikenberry, Appellee Eric H. Holder Jr., Attorney General, Appellee Janet Napolitano, Appellee Anne Patterson and Appellee Christopher Richard answering brief due 03/04/2011. The optional reply brief is due 14 days after service of the appellee brief. [7647369] (TH)
3/4/11	20	Submitted (ECF) Answering brief for review. Submitted by Appellant

DATE	DOCKET NUMBER	PROCEEDINGS
		Fauzia Din and Appellees Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr. and Janet Napolitano. Date of service: 03/04/2011. [7669721] (SIY)
3/7/11	21	Filed clerk order: The answering brief [20] submitted by appellees is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7670412] (CW)
3/10/11	22	Received 7 paper copies of Answering brief [20] filed by appellees. [7676106] (SD)
3/16/11	23	Oral extension by phone of time to file optional reply brief. Appellant Fauzia Din reply brief due 04/04/2011. [7683443] (LKK)
4/4/11	24	Submitted (ECF) Reply brief for review. Submitted by Appellant Fauzia Din. Date of service: 04/04/2011. [7704440] (HCL)
4/5/11	25	Filed clerk order: The reply brief [24] submitted by Fauzia Din is filed. Within 7 days of the filing of this

DATE	DOCKET NUMBER	PROCEEDINGS
		order, filer is ordered to file 7 copies of the brief in paper format, with a gray cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7704891] (LA)
	26	Received 7 paper copies of Reply brief [24] filed by Fauzia Din. [7711492] (SD)
	27	Notice of Oral Argument on JULY 18, 2012 SF Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Please open attached documents to view details about your case. [8169192] (KS)
	28	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Ms. Heidi C. Larson Howell for Appellant Fauzia Din. [8170203] (HCL)
	29	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Ila C. Deiss for Appellees Janet Napolitano, Hilary Clinton, Eric H. Holder, Jr., Anne Patterson, Christo-

DATE	DOCKET NUMBER	PROCEEDINGS
		pher Richard and Karl W. Eikenberry. [8178215] (ICD)
7/18/12	30	ARGUED AND SUBMITTED TO RICHARD R. CLIFTON, MARY H. MURGUIA and RANER C. COLLINS. [8254512] (EL)
5/23/13	31	FILED OPINION (RICHARD R. CLIFTON, MARY H. MURGUIA and RANER C. COLLINS) REVERSED AND REMANDED. Judge: RRC Dissenting, Judge: MHM Authoring, FILED AND ENTERED JUDGMENT. [8640108] (RP)
7/2/13	32	Filed (ECF) Appellees Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr., Janet A. Napolitano, Anne Patterson and Christopher Richard Motion to extend time to file petition for rehearing until 08/08/2013. Date of service: 07/02/2013. [8689134] (SIY)
7/3/13	33	Appellees Hilary Clinton, Anne Patterson and Karl W. Eikenberry in 10-16772 substituted by Appellees John F. Kerry, Richard Olson and James B. Cunningham in 10-16772 (per 05/23/2013 Opinion). [8690989] (RY)

DATE	DOCKET NUMBER	PROCEEDINGS
7/5/13	34	Filed order (RICHARD R. CLIFTON, MARY H. MURGUIA and RANER C. COLLINS) IT IS ORDERED granting Respondents-Appellees unopposed Motion to Extend Time to File a Petition for Rehearing En Banc (Doc. 32). The petition shall be filed by August 8, 2013. [8692503] (SM)
8/5/13	35	Filed (ECF) Appellees James B. Cunningham, Eric H. Holder, Jr., John F. Kerry, Janet A. Napolitano, Richard Olson and Christopher Richard Unopposed Motion to extend time to file petition for rehearing until 09/09/2013. Date of service: 08/05/2013. [8730845] (SIY)
8/6/13	36	Filed order (RICHARD R. CLIFTON, MARY H. MURGUIA and RANER C. COLLINS): IT IS ORDERED granting Defendants-Appellees second unopposed Motion to Extend Time to File a Petition for Rehearing En Banc (Doc. 35). The petition shall be filed by September 9, 2013. [8732230] (AF)
9/9/13	37	Filed (ECF) Appellees James B. Cunningham, Eric H. Holder, Jr., John F. Kerry, Janet A. Napolitano,

DATE	DOCKET NUMBER	PROCEEDINGS
		Richard Olson and Christopher Richard petition for rehearing en banc (from 05/23/2013 opinion). Date of service: 09/09/2013. [8774957]—[COURT UPDATE: Attached 5/23/2013 opinion. Resent NDA. 09/10/2013 by RY] (SIY)
9/12/13	38	Filed order (MARY H. MURGUIA) The appellant is directed to file a response to the appellees' petition for rehearing en banc filed September 9, 2013. The response shall not exceed 15 pages or 4,200 words and shall be filed within 21 days of the date of this order. Parties who are registered for electronic case filing must file the response electronically without submission of paper copies. Parties who are not registered for electronic case filing filers must file the original response plus 50 paper copies. [8779913] (SM)
9/27/13	39	Filed (ECF) Appellant Fauzia Din Unopposed Motion to extend time to file a response until 10/24/2013. Date of service: 09/27/2013. [8800506] (HCL)
9/30/13	40	Filed order (RICHARD R. CLIFTON, MARY H. MURGUIA and

DATE	DOCKET NUMBER	PROCEEDINGS
		RANER C. COLLINS): IT IS ORDERED granting Appellant's unopposed Motion to Extend Time to File a Response to Appellees' Petition for Rehearing En Banc. Appellant's response shall be filed by October 24, 2013. [8801791] (AF)
10/24/13	41	Filed (ECF) Appellant Fauzia Din response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges). Date of service: 10/24/2013. [8836150]. (HCL)
12/24/13	42	Filed order (RICHARD R. CLIFTON, MARY H. MURGUIA and RANER C. COLLINS) Judge Clifton has voted to grant the petition for rehearing en banc. Judge Murguia has voted to deny the petition for rehearing en banc and Judge Collins so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellees' petition for rehearing en banc,

DATE	DOCKET NUMBER	PROCEEDINGS
		filed September 9, 2013, is DENIED. [8915224] (WL)
1/22/14	43	MANDATE ISSUED. (RRC, MHM and RCC) [8947582] (CW)
3/24/14	44	Received letter from the Supreme Court dated 03/20/2014 regarding the application for an ext of time within which to file a petition for writ of cert extended the time to and including 4/23/14. Application No: 13A932. [9031989] (RR)
4/15/14	45	Received letter from the Supreme Court dated 04/10/2014 regarding the application for a further ext of time within which to file a petition for a writ of cert extended the time to and including 5/23/14. Application No. 13A932. [9060146] (RR)
6/2/14	46	Received notice from the Supreme Court: petition for certiorari filed on 05/23/2014. Supreme Court Number 13-1402. [9115412] (RR)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(San Francisco)

Civil Docket No. 3:10-cv-00533-JST

FAUZIA DIN, PLAINTIFF

v.

JOHN F. KERRY, SECRETARY OF STATE; JANET A. NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES; ANNE PATTERSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ESLAMABAD, PAKISTAN; CHRISTOPHER RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; KARL W. EIKENBERRY, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/5/10	1	COMPLAINT for Writ of Mandamus & Declaratory Relief—[No Summons Issued] against Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr, Janet Napolitano, Anne Patterson &

DATE	DOCKET NUMBER	PROCEEDINGS
		Christopher Richard, [Filing Fee: $350.00, Receipt Number 546110006777]. Filed by Plaintiff Fauzia Din. (Attachments: #(1) Civil Cover Sheet). (tn, COURT STAFF) (Filed on 2/5/2010) (Entered: 02/09/2010)
2/5/10	2	PROCEDURAL ORDER for Immigration Mandamus Cases. (tn, COURT STAFF) (Filed on 2/5/2010) (Entered: 02/09/2010)
2/5/10	3	CERTIFICATION of Interested Entities or Persons Filed by Plaintiff Fauzia Din. (tn, COURT STAFF) (Filed on 2/5/2010) (Entered: 02/09/2010)
2/5/10		CASE DESIGNATED for Electronic Filing. (tn, COURT STAFF) (Entered: 02/09/2010)
2/3/10	4	SUMMONS Issued as to Defendants Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr., Janet Napolitano, Anne Patterson & Christopher Richard. (tn, COURT STAFF) (Filed on 2/8/2010) (Entered: 02/09/2010)
3/3/10	5	CERTIFICATE OF SERVICE by Fauzia Din re 1 Complaint, *by mail*

DATE	DOCKET NUMBER	PROCEEDINGS
		(Larson, Heidi) (Filed on 3/3/2010) (Entered: 03/03/2010)
3/3/10	6	CERTIFICATE OF SERVICE by Fauzia Din re 1 Complaint, *by personal service* (Larson, Heidi) (Filed on 3/3/2010) (Entered: 03/03/2010)
3/15/10	7	Declination to Proceed Before a U.S. Magistrate Judge by Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr, Janet Napolitano, Anne Patterson, Christopher Richard. (Deiss, Ila) (Filed on 3/15/2010) (Entered: 03/15/2010)
3/15/10	8	CLERK'S NOTICE of Impending Reassignment to U.S. District Judge (ahy, COURT STAFF) (Filed on 3/15/2010) (Entered: 03/15/2010)
3/16/10	9	ORDER REASSIGNING CASE. Case reassigned to Hon. Marilyn H. Patel for all further proceedings. Magistrate Judge Bernard Zimmerman no longer assigned to the case. Signed by Executive Committee on 3/16/10. (ha, COURT STAFF) (Filed on 3/16/2010) (Entered: 03/16/2010)
4/23/10	10	MOTION to Dismiss; *Notice of Motion* filed by Hilary Clinton, Karl W.

DATE	DOCKET NUMBER	PROCEEDINGS
		Eikenberry, Eric H. Holder, Jr, Janet Napolitano, Anne Patterson, Christopher Richard. Motion Hearing set for 6/14/2010 02:00 PM in Courtroom 15, 18th Floor, San Francisco. (Attachments: # 1 Proposed Order) (Deiss, Ila) (Filed on 4/23/2010) (Entered: 04/23/2010)
5/24/10	11	Memorandum in Opposition re 10 MOTION to Dismiss; *Notice of Motion* filed by Fauzia Din. (Larson, Heidi) (Filed on 5/24/2010) (Entered: 05/24/2010)
6/1/10	12	CLERKS NOTICE submitting defendant's motion to dismiss on the papers; Hearing date of 6/14/2010 vacated. (awb, COURT STAFF) (Filed on 6/1/2010) (Entered: 06/01/2010)
6/1/10	13	Reply to Opposition filed by Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr, Janet Napolitano, Anne Patterson, Christopher Richard. (Deiss, Ila) (Filed on 6/1/2010) (Entered: 06/01/2010)
6/22/10	14	MEMORANDUM AND ORDER GRANTING defendants' Motion to Dismiss; Clerk of Court shall close

DATE	DOCKET NUMBER	PROCEEDINGS
		the file; Signed by Judge Marilyn Hall Patel on 6/21/2010. (awb, COURT STAFF) (Filed on 6/22/2010) (Entered: 06/22/2010)
6/24/10	15	JUDGMENT. Signed by Judge Marilyn Hall Patel on 06/23/10. (sis, COURT STAFF) (Filed on 6/24/2010) (Entered: 06/25/2010)
8/11/10	16	NOTICE OF APPEAL as to 15 Judgment, 14 Order Dismissing Case by Fauzia Din. Filing fee $ 455.00. Receipt Number 34611049191. (gba, COURT STAFF) (Filed on 8/11/2010) (Entered: 08/11/2010)
8/11/10	17	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 16 Notice of Appeal (Attachments: # 1 Notice of Appeal Notification Form) (gba, COURT STAFF) (Filed on 8/11/2010) (Additional attachment(s) added on 8/11/2010: # 2 Docket Sheet) (gba, COURT STAFF). (Entered: 08/11/2010)
8/11/10		Copy of Notice of Appeal and Docket sheet mailed to all counsel (gba, COURT STAFF) (Filed on 8/11/2010) (Entered: 08/11/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
8/16/10	18	USCA Case Number 10-16772 for 16 Notice of Appeal filed by Fauzia Din. (gba, COURT STAFF) (Filed on 8/16/2010) (Entered: 08/16/2010)
5/29/13	19	USCA OPINION REVERSED AND REMANDED as to 16 Notice of Appeal filed by Fauzia Din. (gba, COURT STAFF) (Filed on 5/29/2013) (Entered: 05/29/2013)
7/9/13	20	ORDER of USCA as to 16 Notice of Appeal filed by Fauzia Din (gba, COURT STAFF) (Filed on 7/9/2013) (Entered: 07/09/2013)
7/16/13	21	NOTICE by Fauzia Din *of Change of Attorney Business or Contact Information* (Larson, Heidi) (Filed on 7/16/2013) (Entered: 07/16/2013)
7/17/13	22	NOTICE of Appearance by Geoffrey David DeBoskey (DeBoskey, Geoffrey) (Filed on 7/17/2013) (Entered: 07/17/2013)
8/7/13	23	ORDER of USCA as to 16 Notice of Appeal filed by Fauzia Din (gbaS, COURT STAFF) (Filed on 8/7/2013) (Entered: 08/07/2013)
9/19/13	24	ORDER of USCA as to 16 Notice of Appeal filed by Fauzia Din (gbaS,

DATE	DOCKET NUMBER	PROCEEDINGS
		COURT STAFF) (Filed on 9/19/2013) (Entered: 09/19/2013)
10/4/13	25	ORDER of USCA as to 16 Notice of Appeal filed by Fauzia Din. (gbaS, COURT STAFF) (Filed on 10/4/2013) (Entered: 10/04/2013)
12/27/13	26	ORDER of USCA as to 16 Notice of Appeal filed by Fauzia Din. (gbaS, COURT STAFF) (Filed on 12/27/2013) (Entered: 12/27/2013)
3/7/14	27	MANDATE of USCA as to 16 Notice of Appeal filed by Fauzia Din. (gbaS, COURT STAFF) (Filed on 3/7/2014) (Entered: 03/07/2014)
3/7/14	28	CLERKS Letter Spreading Mandate to Counsel. (gbaS, COURT STAFF) (Filed on 3/7/2014) (Entered: 03/07/2014)
3/10/14	29	**ORDER, Case reassigned to Hon. Jon S. Tigar. Hon. Marilyn H. Patel no longer assigned to the case.. Signed by Executive Committee on 3/10/14. (haS, COURT STAFF) (Filed on 3/10/2014) (Entered: 03/10/2014)**

DATE	DOCKET NUMBER	PROCEEDINGS
3/11/14	30	CLERK'S NOTICE SETTING CASE MANAGEMENT CONFERENCE. Case Management Statement due by 4/30/2014. Initial Case Management Conference set for 5/14/2014 at 2:00 PM in Courtroom 9, 19th Floor, San Francisco. (Attachments: # 1 Standing Order, # 2 Standing Order for All Judges of the Northern District) (wsn, COURT STAFF) (Filed on 3/11/2014) (Entered: 03/11/2014)
3/12/14	31	NOTICE of Appearance by Stacey Ilene Young (Young, Stacey) (Filed on 3/12/2014) (Entered: 03/12/2014)
3/26/14	32	MOTION to Substitute Attorney *Theodore Roethke* filed by Fauzia Din. (Prasad, Anoop) (Filed on 3/26/2014) (Entered: 03/26/2014)
4/29/14	33	STIPULATION WITH [PROPOSED] ORDER *to Extend Dates* filed by Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr, Janet Napolitano, Anne Patterson, Christopher Richard. (Young, Stacey) (Filed on 4/29/2014) (Entered: 04/29/2014)
4/30/14	34	**STIPULATION AND ORDER re 33 STIPULATION WITH PROPOSED**

DATE	DOCKET NUMBER	PROCEEDINGS
		ORDER to Extend Dates filed by Karl W. Eikenberry, Eric H. Holder, Jr., Anne Patterson, Janet Napolitano, Christopher Richard, Hilary Clinton. Case Management Statement due by 5/30/2014. Initial Case Management Conference set for 6/11/2014 at 2:00 PM in Courtroom 9, 19th Floor, San Francisco. Signed by Judge Jon S. Tigar on April 30, 2014. (wsn, COURT STAFF) (Filed on 4/30/2014) (Entered: 04/30/2014)
5/29/14	35	STIPULATION WITH [PROPOSED] ORDER *to Stay Case* filed by Hilary Clinton, Karl W. Eikenberry, Eric H. Holder, Jr, John F. Kerry, Janet Napolitano, Anne Patterson, Christopher Richard. (Young, Stacey) (Filed on 5/29/2014) (Entered: 05/29/2014)
5/30/14	36	**STIPULATION AND ORDER re 35 STIPULATION WITH PROPOSED ORDER TO STAY CASE filed by Karl W. Eikenberry, Eric H. Holder, Jr., Anne Patterson, John F. Kerry, Janet Napolitano, Christopher Richard, Hilary Clinton. Signed by Judge Jon S. Tigar on May 30, 2014. (wsn, COURT STAFF) (Filed on 5/30/2014) (Entered: 05/30/2014)**

DATE	DOCKET NUMBER	PROCEEDINGS
5/30/14	37	CLERK'S NOTICE VACATING CASE MANAGEMENT CONFERENCE. The case management conference set for 6/11/2014 is VACATED. *This is a text only order. There is no document associated with this notice.* (wsn, COURT STAFF) (Filed on 5/30/2014). (Entered: 05/30/2014)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. [C10-00533]

FAUZIA DIN, PLAINTIFF

v.

HILLARY CLINTON, SECRETARY OF STATE; JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES; ANNE PATTERSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; CHRISTOPHER J. RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; KARL W. EIKENBERRY, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN; JOHN OR JANE DOE, AKA "HJK," CONSULAR OFFICER; JOHN OR JANE ROE, AKA "NP," CONSULAR OFFICER; AND JOHN COE, AKA "YAQUBI," EMBASSY EMPLOYEE, DEFENDANTS

[Filed: Feb. 5, 2010]

IMMIGRATION MANDAMUS CASE

COMPLAINT FOR WRIT OF MANDAMUS AND DECLARATORY RELIEF

INTRODUCTION

1. This is an individual action challenging the government's decision to deny the visa application of Plaintiff's husband for purported national security and terrorism grounds under 8 U.S.C. § 1182(a)(3)(B). Plaintiff, a naturalized U.S. citizen and former refugee, brings

this suit on the grounds that the government is unlawfully depriving Plaintiff of her constitutional right to marriage by denying her husband's visa application in the absence of a facially legitimate and bona fide reason.

2. Plaintiff brings this action to compel Defendants, and those acting under them, to grant her husband's visa application, or else reconsider the visa application in a manner prescribed by law, so that she may finally achieve reunification with her husband.

PARTIES

3. Plaintiff Fauzia Din is a naturalized citizen of the United States and former Afghan refugee. Ms. Din was born in Kabul, Afghanistan and is currently a resident of Fremont, California.

4. Defendant Hillary Clinton is the United States Secretary of State and, as such, has ultimate authority over the Department of State and its agents. Secretary Clinton is charged with administration and enforcement of the Immigration and Nationality Act ("INA"), and has ultimate decision-making authority over the matters alleged in this Complaint. 8 U.S.C. § 1104. Secretary Clinton is sued in her official capacity.

5. Defendant Janet Napolitano is the Secretary of the Department of Homeland Security ("DHS"). Secretary Napolitano is charged with, among other things, implementing and enforcing the INA, and has decision-making authority over the matters alleged in this Complaint. 8 U.S.C. § 1103; 8 C.F.R. § 2.1. Secretary Napolitano is sued in her official capacity.

6. Defendant Eric H. Holder, Jr. is the Attorney General of the United States and, as such, is the Chief

Law Enforcement Officer of the federal government and head of the United States Department of Justice. The Attorney General has authority over all laws governing the immigration and naturalization of aliens. 8 U.S.C. § 1103(g). Attorney General Holder is sued in his official capacity.

7. Defendant Anne Patterson is the Ambassador of the United States Embassy in Islamabad, Pakistan ("Islamabad Embassy") and as such, has authority over the day-to-day functions of the Embassy. Ambassador Patterson is sued in her official capacity.

8. Defendant Christopher J. Richard is the Consul General of the Consular Section at the Islamabad Embassy, and as such, has authority over the processing of visa applications and issuing of immigrant visas at the Embassy. Consul General Richard is sued in his official capacity.

9. Defendant Karl W. Eikenberry is the Ambassador of the United States Embassy in Kabul, Afghanistan ("Kabul Embassy"), and as such, has authority over the day-to-day functions of the Embassy. Ambassador Eikenberry is sued in his official capacity.

10. Defendant JOHN OR JANE DOE, aka "HJK," is a consular officer of the Islamabad Embassy and as such, has authority to adjudicate immigrant visa applications. Defendant HJK is sued in his or her official capacity.

11. Defendant JOHN OR JANE ROE, aka "NP," is a consular officer of the Islamabad Embassy and as such, has authority to adjudicate immigrant visa applications. Defendant NP is sued in his or her official capacity.

12. Defendant JOHN COE, aka "YAQUBI," is an employee of the Kabul Embassy who has worked on Plaintiff's husband's visa application, and is sued in his official capacity.

JURISDICTION

13. Subject matter jurisdiction in this case is proper pursuant to the Mandamus Act, 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; and 28 U.S.C. § 1331.

14. In particular, this Court has subject matter jurisdiction to review claims by U.S. citizens challenging visa denials where constitutionally protected rights are alleged to have been violated by such a denial. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Bustamante v. Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009); *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990); *Abourezk v. Reagan*, 785 F.2d 1043. 1050 (D.C. Cir. 1986).

15. Additionally, this Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412.

VENUE AND INTRADISTRICT VENUE

16. Venue is proper in this Court, pursuant to 28 U.S.C. § 1391(e), as this is an action against officers and agencies of the United States in their official capacities, brought in the district where Plaintiff resides, and no real property is involved in the action. *See Macias v. Finch*, 324 F. Supp. 1252, 1255 (N.D. Cal. 1970); *Billiteri v. U S. Board of Parole*, 385 F. Supp. 1217, 1219 (W.D.N.Y. 1974).

17. In light of Plaintiff's residence in Fremont, this action is subject to assignment to the San Francisco Division or the Oakland Division under Local Rule 3-2(d).

FACTS

Plaintiff Is A U.S. Citizen

18. Plaintiff was born in Kabul, Afghanistan. In 1998, plaintiff and her mother and sister fled to Pakistan to escape the Taliban regime that had seized power in Afghanistan in 1996. In 2000, Plaintiff, her mother and her sister arrived in the United States as refugees.

19. On November 20, 2007, Plaintiff became a naturalized citizen of the United States.

20. Plaintiff is presently employed part-time as an in-home support services (IHSS) caretaker, with an annual income of less than $15,000. When Plaintiff is not working, she cares for her mother, an invalid.

Background Facts Concerning Plaintiff's Husband, Mr. Berashk

21. Mr. Kanishka Berashk is Plaintiff's husband of over three years. Mr. Berashk was born in Kunduz, Afghanistan and currently resides in the city of Kabul.

22. Since 2003, Mr. Berashk has been employed as a government clerk in the Afghan Ministry of Education, where his job duties primarily involve processing paperwork and other low-level administrative duties.

23. From 1992 to 2003, Mr. Berashk worked as a payroll clerk in the Afghan Ministry of Social Welfare, where his job duties involved payroll processing for school teachers and other low-level administrative duties.

From 1996-2001, during the Taliban occupation of Afghanistan, Mr. Berashk continued to work in the Ministry of Social Welfare in the same capacity as before (and after) the Taliban occupation.

24. During Taliban occupation of Afghanistan from 1996 to 2001, Mr. Berashk never implemented (nor was ever asked to implement) any policy changes on the Taliban's behalf. In fact, he did not even have any direct contact with the new regime, as his immediate supervisor was in that position before the regime change.

Plaintiff's Visa Petition on Behalf of Mr. Berashk

25. In September 2006, Plaintiff returned to Kabul to marry Mr. Berashk, whom she had known for many years.

26. On October 11, 2006, promptly upon returning to the United States, Plaintiff filed a visa petition (Form I-130, Petition for Alien Relative) on behalf of Mr. Berashk, her new husband.

27. On February 12, 2008, the United States Citizenship & Immigration Services ("USCIS") notified Plaintiff that her visa petition for Mr. Berashk had been approved and sent to the Department of State National Visa Center ("NVC") for additional processing.

28. On July 29, 2008, the National Visa Center notified Plaintiff that it had completed processing of the visa petition, and that an immigrant visa interview for Mr. Berashk was scheduled for September 9, 2008 at the Islamabad Embassy.

Mr. Berashk's Visa Application: Seeming Approval, Delay and Then Denial

29. On September 9, 2008, Mr. Berashk appeared at the Islamabad Embassy for his scheduled immigrant visa interview. During his interview, Mr. Berashk answered all questions truthfully and accurately. He discussed his marital relationship with Plaintiff, acknowledged that he had worked in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation, and reflected on the difficulty of life under the Taliban occupation.

30. Upon conclusion of the interview, Mr. Berashk was given a Form 194 letter (dated September 9, 2008) by a consular officer (identified as "HJK" on the Form 194 letter), who then instructed Mr. Berashk to take his passport to the Kabul Embassy. The Form 194 letter stated that a "Mr. Yaqubi" of the Kabul Embassy "will send your passport to [the Islamabad Embassy], [which] will issue the visa and return it to the [Kabul Embassy]." Mr. Berashk was given no indication of any problems with his visa application. In fact, the consular officer who interviewed Mr. Berashk told him that he should expect to receive his visa in 2-6 weeks, and even remarked that he was pleased Mr. Berashk's paperwork was so clear and thorough. As instructed, Mr. Berashk returned to Afghanistan and turned in his passport to the Kabul Embassy.

31. Despite the interviewing consular officer's reassurances, Mr. Berashk did not receive his visa within the six weeks following his September 9, 2008 interview at the Islamabad Embassy. (And, in fact, Mr. Berashk never received a visa at all.)

32. Between October 2008 and January 2009, Mr. Berashk placed numerous calls to the Islamabad Embassy

asking about the status of his visa application. No information was provided to him.

33. On January 28, 2009, Mr. Berashk wrote an email to the Immigration Visa Unit of the Islamabad Embassy regarding his visa application, to which he received the following email response: "Our record indicates that the case is still pending under administrative process and we will contact the applicant(s) upon completion of this process. Also, time duration for the process is always approximated [sic] therefore maximum [sic] cannot be predicted."

34. Plaintiff and Mr. Berashk waited another five months for the visa process to conclude. During that period, each placed numerous calls to the Islamabad Embassy to determine the visa application's status, but to no avail.

35. Finally, in or around early June 2009, Plaintiff contacted the office of U.S. Representative Stark to request that he draft a letter on Plaintiff's behalf to the Islamabad Embassy regarding the status of Mr. Berashk's visa application. Plaintiff hoped that a letter from a Member of Congress would compel the embassy to give greater weight to the inquiry.

36. On June 7, 2009, Mr. Berashk received another Form 194 letter, this time signed by consular officer "NP" and dated June 5, 2009 ("Form 194 denial"). The Form 194 denial indicated that Mr. Berashk's visa application had been denied under Section 212(a) of the INA (8 U.S.C. § 1182(a), and that there was "no possibility of a waiver of this ineligibility." The Form 194 denial failed

to indicate which subsection of INA § 212(a) in particular applied to Mr. Berashk's case.

37. The Form 194 denial further instructed Mr. Berashk to refer to a "Form DSL-851A for further details," but no "Form DSL-851A" was included with the Form 194 denial. To this day, neither Plaintiff nor Mr. Berashk have received a Form DSL-851A.

38. On June 16, 2009, the Islamabad Embassy responded to Representative Stark's inquiry by way of a letter signed by Christopher J. Richard, Consul General ("the June 16 Letter"). The June 16 letter stated that "Mr. Berashk's case continues to undergo administrative processing," and "[a]pplicants may have to wait several months or longer before their visas are issued." Of course, by this time Mr. Berashk's visa application had already been denied by the Form 194 denial—eleven days *before* the June 16 letter was written.

39. On July 11, 2009, Mr. Berashk sent an email to the Islamabad Embassy requesting clarification as to why his visa application had been denied. On July 13, 2009, the Islamabad Embassy responded by email, stating that Mr. Berashk's application had been denied under INA § 212(a)(3)(B) (codified as 8 U.S.C. § 1182(a)(3)(B))—the terrorism and national security bars to admissibility. The email further stated that "[i]t is not possible to provide a detailed explanation of the reasons for the refusal," citing INA §§ 212(b)(2)-(3) (8 U.S.C. §§ 1182(b)(2)-(3)).

Plaintiff's Requests for Reconsideration or Explanation for the Denial

40. Upon learning that Mr. Berashk had been declared ineligible for a visa without possibility of waiver, Plaintiff immediately contacted a local attorney for legal assistance. Because Plaintiff could not afford to pay for legal counsel, she was subsequently referred to the Asian Law Caucus ("ALC"), a San Francisco based civil rights organization, who agreed to represent Plaintiff on a *pro bona* basis.

41. On July 28, 2009, Plaintiff wrote a letter to Representative Stark, requesting his assistance in contacting the U.S. State Department regarding the denial of Mr. Berashk's visa application, and to request reconsideration of that decision. In a letter response dated August 11, 2009, Representative Stark indicated that he had placed inquiries on Plaintiff's behalf to the "appropriate authority," and that he would contact Plaintiff as soon as he received a reply. Plaintiff is in formed and believes and therefore alleges that neither Representative Stark nor his staff has received a reply to this or any of their subsequent follow-up inquiries.

42. On September 22, 2009, Plaintiff's pro bono counsel sent a letter (the "September 22 Letter") to the Immigrant Visa Unit of the Islamabad Embassy to request reconsideration of the denial of Mr. Berashk's visa application or, in the alternative, to provide Plaintiff with facts that would support a good faith belief that Mr. Berashk posed a national security risk under 8 U.S.C. § 1182(a)(3)(B). The next day, counsel received an automated email response from the Islamabad Embassy,

identical to the Islamabad Embassy's July 13 email response to Mr. Berashk's inquiry.

43. On October 7, 2009, Plaintiff's pro bono counsel sent another letter (the "October 7 Letter"), this time to the Office of Visa Services, Bureau of Consular Affairs of the U.S. Department of State ("Office of Visa Services"), again requesting reconsideration of the denial of Mr. Berashk's visa application or an explanation as to why the State Department believes Mr. Berashk poses a national security risk so as to warrant ineligibility under 8 U.S.C. § 1182(a)(3)(B).

44. On October 16, 2009, Plaintiff's counsel called the office of Mr. Edward Ramotowski, the managing director of the Office of Visa Services, to inquire whether a response to Plaintiff's October 7 Letter was forthcoming. Counsel explained the nature of the October 7 Letter to Director Ramotowski's secretary, who replied that such inquiries should be directed to "LegalNet," a Department of State sponsored email channel for attorneys to inquire about the status of visa applications. Director Ramotowski's secretary also informed counsel that she would also pass along a message to Director Ramotowski regarding this matter. That same day, counsel forwarded the October 7 Letter to LegalNet as instructed, and promptly received an automated email response acknowledging receipt of the October 7 Letter, and requesting that Plaintiff allow seven working days for a reply.

45. On October 27, 2009, Plaintiff's counsel again contacted the Office of Visa Services, having not received a response from LegalNet. Counsel spoke again with Director Ramotowski's secretary, who said that after

speaking with Director Ramotowski, she was now informed that the proper individual to whom such inquiries should be directed was Ms. Crystal Davis, the Office Management Specialist of the Public Inquiries Division of the U.S. State Department. Counsel promptly called and left a voicemail for Ms. Davis, explaining the facts of the case and requesting a return call.

46. On October 30, 2009, counsel again attempted unsuccessfully to reach Ms. Davis, and left her another voicemail requesting a return call.

47. On November 5, 2009, counsel received a return call from a woman who identified herself as "Shirley Jones" of the Public Inquiries Division of the U.S. State Department. During this conversation, Ms. Jones stated that LegalNet, and *not* the Public Inquiries Division, was the proper channel to direct Plaintiff's inquiry regarding her husband's visa application. When counsel explained that he had already sent LegalNet a letter, Ms. Jones recommended that counsel resend the October 7 letter to LegalNet. That same day, counsel resent the October 7 letter by email to LegalNet as suggested by Ms. Jones.

48. On November 6, 2009, counsel received the following email response from LegalNet: "Sorry that no one had as yet replied to your request for reconsideration regarding Mr. Berashk's visa. LegalNet forwarded your request to the appropriate division within the Visa Office. You will be contacted as soon as we get a reply."

49. On November 17, 2009, counsel received another email from LegalNet with the identical statement contained in both the Islamabad Embassy's July 13 email

response to Mr. Berashk's inquiry and its response to the September 22 Letter: "Mr. Kanishka Berashk's visa application was denied under Section 212(a)(3). It is not possible to provide a detailed explanation of the reasons for the refusal. We regret that our response could not have been more informative, but hope that this information is helpful."

50. On November 17, 2009, after being separated from her husband for years, Plaintiff departed the United States bound for Afghanistan, having purchased an airplane ticket with borrowed funds. On November 20, 2009, Plaintiff arrived in Kabul. On November 23, 2009, Plaintiff went to the United States Embassy in Kabul to ask why her husband's visa had been denied. She was told by an unidentified Embassy employee that the Kabul Embassy had no information to provide her as the visa application was handled by the United States Embassy in Islamabad, Pakistan. On December 3, 2009, Plaintiff departed Afghanistan bound for Afghanistan.

51. On December 4, 2009, Plaintiff went to the United States Embassy in Islamabad, Pakistan and asked why her husband's visa had been denied. Plaintiff spoke with an unidentified consular officer who told her that the decision was final, that she had already been informed of the decision, and that the relevant documents had already been sent to the immigration authorities. On December 10, 2009, Plaintiff returned to Kabul. Plaintiff does not wish to stay in Kabul, she wishes to return, with her husband, to her country of citizenship, the United States. Plaintiff is currently preparing to return to the United States without her husband, in order to

continue her struggle to bring her husband to live with her in the United States.

52. To date, neither Plaintiff nor her attorneys have received any substantive response from the Kabul Embassy, the Islamabad Embassy, LegalNet, the Office of Visa Services, or the Public Inquiries Division of the U.S. State Department to their repeated inquiries about the denial of Mr. Berashk's visa application and requests for reconsideration of such denial.

53. On January 4, 2010, USCIS sent Plaintiff a "Notification of Action" (Form I-797), indicating that USCIS had received her visa petition back from the Department of State, signaling finality of the denial.

54. Plaintiff has exhausted her administrative remedies. As set forth in detail above, Plaintiff and her representatives have made numerous inquiries and requests over the past few months concerning the denial of her husband's visa application, but to no avail. Plaintiff has no other means but to attain the requested relief.

FIRST CLAIM FOR RELIEF

(Writ of Mandamus - 28 U.S.C. § 1361)

55. Plaintiff realleges paragraphs 1 through 54 as if fully set forth here.

56. As a U.S citizen, Plaintiff has a liberty interest in her marriage to Mr. Berashk that is protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *Bustamante*, 531 F.3d at 1062. Defendants cannot deprive Plaintiff of her constitutionally protected right by denying her husband's visa application in the

absence a "facially legitimate and bona fide reason." *Id.* at 1060.

57. No good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B). The fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist.

58. As a result of Defendants' unlawful actions, Plaintiff has been unreasonably and unjustifiably delayed from reunification with her husband of over three years.

59. Because of Defendants' unjustified determination that Mr. Berashk is ineligible for a visa without possibility of waiver, Plaintiff is now forced to choose between two untenable scenarios—either she must uproot herself and her mother and return to Afghanistan, or remain in her country of citizenship without her husband's companionship and support.

60. Pursuant to 28 U.S.C. § 1361, Plaintiff is entitled to a write of mandamus directing Defendants to adjudicate properly Mr. Berashk's visa application in a manner prescribed by law and not on the basis of any bad faith or illegitimate reasons.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment that 8 U.S.C. §1182(b) is Unconstitutional vis-à-vis Plaintiff)

61. Plaintiff realleges paragraphs 1 through 60 as if fully set forth here.

62. Section 1182(b) of Title 8 of the United States Code states, in relevant part, that in the event an alien's visa application is denied, the consular officer "shall provide the *alien* with a timely written notice that states the determination, and lists the specific provision or provisions of law under which the alien is inadmissible or [ineligible for] adjustment of status." 8 U.S.C. § 1182(b)(1) (emphasis added). The statute further states that the notice requirements of subsection 1182(b)(1) "does not apply to any alien inadmissible under [8 U.S.C. § 1182(a)(2) or (3)]." 8 U.S.C. § 1182(b)(3). This section does not address notice provisions for *U.S. citizens.*

63. The notice of denial provisions as set forth in 8 U.S.C. § 1182(b) are facially invalid and unconstitutional as applied to Plaintiff. She is not an alien. Rather, she is a U.S. citizen entitled to procedural due process under the Fifth Amendment. By repeatedly refusing to provide Plaintiff with a "facially legitimate and bona fide reason" for the denial of her husband's visa application, Defendants have violated Plaintiff's constitutional right to due process. *Bustamante*, 531 F.3d at 1060.

64. Plaintiff is consequently entitled to a judicial declaration that the notice of denial provisions in 8 U.S.C. § 1182(b)(2) and (3) are facially invalid and unconstitu-

tional as applied to her, and deprive Plaintiff of procedural due process in violation of the U.S. Constitution

THIRD CLAIM FOR RELIEF

(Declaratory Judgment - Violation of the Administrative Procedure Act)

65. Plaintiff realleges paragraphs 1 through 64 as if fully set forth here.

66. Defendants have failed to adduce any facts that would support a good faith basis to deny Mr. Berashk's visa application given that the relevant facts set forth above fail to trigger any of the grounds of inadmissibility set forth in 8 U.S.C. § 1182(a)(3)(B.

67. Because Defendants have misconstrued and misapplied 8 U.S.C. § 1182(a)(3)(B) to justify the denial of Mr. Berashk's visa application, Defendants have failed to properly carry out the adjudicative functions delegated to them by law, therefore committing agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (B), and (D).

68. Plaintiff is entitled to a judicial declaration that Defendants are in violation of the Administrative Procedure Act by incorrectly interpreting and applying 8 U.S.C. § 1182(a)(3)(B) to justify denial of Mr. Berashk's visa application.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for the following relief:

1. A writ of mandamus directing Defendants to adjudicate the visa application of Plaintiff's husband in a manner prescribed by law and not on the basis of any illegitimate or bad faith reasons;

2. A declaration that the notice of denials provisions as set forth in 8 U.S.C. § 1182(b)(2) and (3) are facially invalid and unconstitutional as applied to Plaintiff, and deprive her of procedural due process in violation of the U.S. Constitution;

3. A declaration that Defendants are in violation of the Administrative Procedure Act by incorrectly interpreting and applying 8 U.S.C. § 1182(a)(3)(B) to justify denial of Mr. Berashk's visa application;

4. Plaintiff's reasonable costs and attorney's fees pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, and 28 U.S.C. § 2412; and

5. Such other and further relief as the Court deems just and proper.

Dated: February 5, 2010

By [ILLEGIBLE]
David Elkins
Heidi C. Larson
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PETITIONER'S BRIEF

FILED
NOV 26 2014
OFFICE OF THE CLERK

No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, ET AL.,
PETITIONERS

v.

FAUZIA DIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether a consular officer's refusal of a visa to a U.S. citizen's alien spouse impinges upon a constitutionally protected interest of the citizen.

2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are John F. Kerry, Secretary of State; Jeh Johnson, Secretary of Homeland Security*; Eric H. Holder, Jr., Attorney General; Richard Olson, Ambassador of the United States Embassy, Islamabad, Pakistan; Christopher Richard, Consul General of the Consular Section at the United States Embassy, Islamabad, Pakistan; and James B. Cunningham, Ambassador of the United States Embassy, Kabul, Afghanistan.

Respondent, who was plaintiff in the district court and appellant in the court of appeals, is Fauzia Din.

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* At the time the court of appeals issued its judgment, the Secretary of Homeland Security was Janet A. Napolitano.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 718 F.3d 856. The opinion of the district court (Pet. App. 37a-49a) is not published in the Federal Supplement but is available at 2010 WL 2560492.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2013. A timely petition for rehearing en banc was denied on December 24, 2013 (Pet. App. 50a-51a). On March 20, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 23, 2014. On April 10, 2014, Justice Kennedy further extended the time to May 23, 2014, and the petition was filed on that date.

The petition was granted on October 2, 2014. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may not be admitted to the United States without having applied for and been issued an immigrant or nonimmigrant visa (except in certain circumstances not relevant to this case). 8 U.S.C. 1181(a) (documentation requirements for immigrants applying for admission); 8 U.S.C. 1182(a)(7) (documentation requirements for nonimmigrants and immigrants seeking admission). When an alien seeks to obtain an immigrant visa on the basis of a family relationship with a United States citizen or lawful permanent resident alien, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the INA sets forth a process involving several distinct steps.

First, the U.S. citizen or lawful permanent resident must file a petition with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS) to have the alien classified as an immediate relative of a U.S. citizen or a family-preference immigrant.[1] See 8 U.S.C. 1153(f),

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[1] The INA and other laws relating to immigration and naturalization are generally administered by the Secretary of Homeland Security, the Attorney General, and the Secretary of State. See 8 U.S.C. 1103, 1104. Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of DHS. Some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the

1154(a)(1); see also 8 U.S.C. 1151(b)(2)(A)(i); 8 C.F.R. 204.1(a)(1); USCIS, *Form I-130, Petition for Alien Relative* (Dec. 18, 2012), http://www.uscis.gov/sites/default/files/files/form/i-130.pdf. The petitioner must provide USCIS with evidence that she has the claimed familial relationship with the beneficiary. See 8 C.F.R. 204.2(a)(2), (d)(2), (f)(2), and (g)(2). She must also attest that she has not committed any crime that would disqualify her from filing a petition. See 8 U.S.C. 1154(a)(1)(A)(viii) and (B)(i)(II). "USCIS thereafter reviews the petition, and approves it if found to meet all requirements." *Scialabba* v. *Cuellar De Osorio*, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.) (citing 8 U.S.C. 1154(b)).[2]

Second, if USCIS approves the petition, an alien outside the United States who is the beneficiary of the petition may (if all other relevant conditions are satisfied) apply for a visa.[3] See 8 U.S.C. 1201(a)(1) (consular officer "may issue" immigrant visa under conditions in INA and regulations); 8 U.S.C. 1202(a) ("Every alien applying for an immigrant visa and for alien

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Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note.

[2] If the beneficiary of an approved petition is a spouse, child (unmarried and under age 21), or parent of a U.S. citizen, that beneficiary will be classified as an "immediate relative[]"—a category for which there are no limits on the number of visas that may be issued in a particular year. See 8 U.S.C. 1151(b)(2)(A)(i).

[3] Unless otherwise specified, the discussion of the visa application process in this brief relates to applications for immigrant visas rather than nonimmigrant visas. The application process is similar in both contexts, however. See, *e.g.*, 8 U.S.C. 1202(c), (d), and (h) (describing requirements for nonimmigrant visa application); 8 U.S.C. 1182(a) (setting forth certain classes of aliens ineligible for either type of visa).

registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed."); 8 U.S.C. 1202(e) (alien must verify application by oath); 22 C.F.R. 42.31, 42.42; see also *Cuellar De Osorio*, 134 S. Ct. at 2198. The application papers must contain a variety of information about the alien's history and background, including his family relationships, work experience, and criminal record. See, *e.g.*, 8 U.S.C. 1202(b) ("The immigrant shall furnish to the consular officer with his application a copy of a certification by the appropriate police authorities stating what their records show concerning the immigrant; a certified copy of any existing prison record, military record, and record of his birth; and a certified copy of all other records or documents concerning him or his case which may be required by the consular officer."). In addition, a visa applicant located outside the United States must appear at a U.S. consulate for an in-person interview with a consular officer in the Department of State. See 8 U.S.C. 1202(a) and (e); *Cuellar De Osorio*, 134 S. Ct. at 2198; 22 C.F.R 42.62.

The authority to grant or deny a visa application rests with the consular officer. See 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.71, 42.81; 8 U.S.C. 1361 (providing that applicant has burden of proof to establish eligibility for visa "to the satisfaction of the consular officer").[4] No visa "shall be issued to an alien" if

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[4] See also 6 U.S.C. 236(b)(1) (vesting in Secretary of Homeland Security "the authority to refuse visas in accordance with law"); 6 U.S.C. 236(c)(1) (reserving Secretary of State's authority to direct consular officer to refuse to issue visa if "such refusal" is "necessary or advisable in the foreign policy or security interests of the United States").

"it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the alien is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 (explaining that "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa"); see also 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison" with the Federal Bureau of Investigation, Central Intelligence Agency, and other security-related agencies to obtain and exchange information).[5]

Section 1182(a) identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a); see, *e.g.*, 8 U.S.C. 1182(a)(1)(A) (health-related reasons for ineligibility); 8 U.S.C. 1182(a)(2) ("[c]riminal and related grounds" for ineligibility). Section 1182(a)(3), at issue in this case, sets forth "[s]ecurity and related grounds" for visa ineligibility and inadmissibility, including—as described in Section 1182(a)(3)(B)—having engaged in "[t]errorist activities." 8 U.S.C. 1182(a)(3). Such terrorist activities include providing material support to a terrorist or terrorist organization; acting as a

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[5] Within specified limits, the INA permits the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General, to "determine in such Secretary's sole unreviewable discretion" that certain bars "shall not apply with respect to an alien within [their] scope." 8 U.S.C. 1182(d)(3)(B)(i); see also, *e.g.*, 8 U.S.C. 1182(a)(9)(B)(v), (g), (h), and (i) (discussing waivers of various grounds of inadmissibility).

representative or member of a terrorist organization; endorsing or espousing terrorist activity or persuading others to do so; and receiving military-type training from a terrorist organization. See 8 U.S.C. 1182(a)(3)(B)(i); see also 8 U.S.C. 1182(a)(3)(B)(iii), (iv), (v), and (vi) (defining "terrorist activity," "engage in terrorist activity," "representative," and "terrorist organization"). In addition, an alien who is "the spouse or child of an alien who is inadmissible" as a result of terrorist activity that occurred within the last five years is herself inadmissible under Section 1182(a)(3)(B), unless she did not know and should not reasonably have known of the activity or there are reasonable grounds to believe that she has renounced the activity. 8 U.S.C. 1182(a)(3)(B)(i)(IX) and (ii).

As a general matter, a consular officer who denies a visa application "because the officer determines the alien to be inadmissible" must "provide the alien with a timely written notice that * * * (A) states the determination, and (B) lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). If, however, the alien is inadmissible on "[c]riminal and related grounds" or on "[s]ecurity and related grounds" (which include "terrorist activity") under 8 U.S.C. 1182(a)(2) or (a)(3), then the statutory written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).[6]

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[6] Pursuant to statute, the Department of State reports to "the appropriate committees of the Congress" all refusals of visas by consular officers "on the grounds of terrorist activities or foreign policy," including in the report "a factual statement of the basis for such denial." 22 U.S.C. 2723(a)(1). Those reports may be "classified to the extent necessary" and must "protect intelligence sources and methods." 22 U.S.C. 2723(b).

2. This Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization for an alien to challenge the refusal of a visa, the alien cannot assert any right to review. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country," *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972), and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); see *Mandel*, 408 U.S. at 766 (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (citation omitted); see also *Fiallo* v. *Bell*, 430 U.S. 787, 792, 794-795 (1977); *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162-1163 (D.C. Cir. 1999) (tracing the history of the doctrine); Richard D. Steel, *Steel on Immigration Law* § 2:11, at 36 (2012 ed.).

No such congressional authorization for review of visa denials exists. Congress has not provided even for administrative review of a consular officer's refusal of a visa. See 8 U.S.C. 1104(a)(1) (excluding from the Secretary of State's authority to administer and enforce the immigration laws those powers, duties, and functions conferred on consular officers with regard to the grant or refusal of visas); 6 U.S.C. 236(b)(1) (barring the Secretary of Homeland Security from "alter[ing] or revers[ing] the decision of a consular officer to refuse a visa"). Congress likewise has not provided for judicial review of a visa refusal. See, *e.g.*, 6 U.S.C. 236(f) (providing that the designation of authorities in Section 236 does not give rise to a pri-

vate right of action against a consular officer to challenge a decision to grant or deny a visa); 8 U.S.C. 1201(i) (providing for judicial review of a decision to *revoke* a nonimmigrant visa only in proceedings to remove an alien from the United States, where revocation is the sole basis for removal); 8 U.S.C. 1252 (discussing judicial review of removal orders).

Accordingly, this Court has not permitted an alien to obtain review of such a decision. On one occasion, this Court considered the availability of judicial review at the behest of U.S. citizens of a decision by the Attorney General not to exercise his discretion to grant a waiver of the grounds of exclusion that had led a consular officer to deny an alien's application for a nonimmigrant visa. See *Mandel*, 408 U.S. at 754, 769-770. In *Mandel*, U.S. citizens asserted that the failure by the Attorney General to grant a waiver implicated their interest under the First Amendment in personally hearing the alien speak at "discussion forums." *Id.* at 768; see *id.* at 767, 769. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Id.* at 769; see *id.* at 770. Rather, the Court disposed of the case on the ground that the record in fact included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that the alien had abused prior waivers by exceeding limitations imposed on his activities in the United States as a condition of those waivers. *Id.* at 758, 769-770. When an alien is excluded from the United States on the basis of the Executive's refusal to exercise its discretionary authority to waive applicable grounds of inadmissibility, the Court explained, "the courts will

neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. The Court did not address the antecedent decision by the consular officer finding the alien ineligible for a visa under the Act.

3. In 2006, respondent, a naturalized U.S. citizen, married Kanishka Berashk, a native and citizen of Afghanistan who resides in that country. See Pet. App. 2a-3a, 38a. After the marriage, respondent filed an immigrant visa petition to have Berashk classified as an immediate relative, which USCIS approved. See *id.* at 3a. Berashk then submitted a visa application and appeared at the United States Embassy in Islamabad, Pakistan, for an interview. See *ibid.*

In June 2009, a consular officer from the U.S. Embassy in Islamabad denied the visa application. See Pet. App. 3a. Berashk was informed that the visa refusal was based on his inadmissibility under 8 U.S.C. 1182(a)(3)(B), which covers "[t]errorist activities." Pet. App. 4a. In a communication that cited 8 U.S.C. 1182(b)(3), which makes the requirement of notice of the ground for a visa denial inapplicable to security-based determinations, Berashk was also told that no further explanation was possible. See Pet. App. 4a.

4. a. Respondent filed suit in federal district court challenging the denial of Berashk's visa application. She asserted three claims: a claim for a writ of mandamus directing government officials "to adjudicate properly [the] visa application * * * not on the basis of any bad faith or illegitimate reasons"; a claim for a declaratory judgment that 8 U.S.C. 1182(b)(3), the exception from the notice requirement, is uncon-

stitutional vis-à-vis a U.S. citizen as a violation of procedural due process; and a claim that petitioners had violated the Administrative Procedure Act by arbitrarily misconstruing and misapplying 8 U.S.C. 1182(a)(3)(B). J.A. 37; see Pet. App. 5a; J.A. 36-39. Her complaint alleged that "[n]o good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of [the] visa application," contending that "[t]he fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." J.A. 37.

The district court granted the government's motion to dismiss. See Pet. App. 37a-49a. The court observed that, under Ninth Circuit precedent, respondent's due process interest in her marriage gave rise to a right to challenge the constitutionality of the procedures used in considering her husband's visa application. See *id.* at 43a-44a (citing *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008)). But the court then ruled that the consular officer's citation of Section 1182(a)(3)(B) constituted a facially legitimate and bona fide reason for the visa denial. The court explained that under 8 U.S.C. 1182(b)(3) "the government may withhold the specific reasons for the denial for aliens who have been determined to be inadmissible under 8 U.S.C. section 1182(a)(2) or (a)(3)," and noted that respondent had not adequately alleged that the consular officer who denied the visa acted in "bad faith." Pet. App. 45a; see *id.* at 46a-49a. Finally, the court ruled that respondent lacked standing to

challenge the constitutionality of 8 U.S.C. 1182(b)(3), which renders the notice requirement inapplicable when an alien is found inadmissible on security grounds, because that provision applies "only to the alien and not the United States citizen." *Id.* at 49a.

b. A divided panel of the Ninth Circuit reversed. See Pet. App. 1a-36a.

i. As an initial matter, while acknowledging that "[f]ederal courts are generally without power to review the actions of consular officials," the majority concluded that, under *Mandel*, "a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa." Pet. App. 6a-7a (citations omitted; brackets in original) (citing *Bustamante*, 531 F.3d at 1062). The majority stated that the right of review was not predicated on a "liberty interest in the ability to live in the United States with an alien spouse." *Id.* at 7a n.1. Rather, it relied on what it described as a "more general right" to "[f]reedom of personal choice in matters of marriage and family life." *Ibid.* (quoting *Bustamante*, 531 F.3d at 1062).[7]

The majority then concluded that "the reason provided by the consular officials for the denial of Berashk's visa" was not "facially legitimate." Pet. App. 7a-9a. The majority faulted the government for not giving "any assurance as to what the consular officer believes the alien has done." *Id.* at 9a; see *id.* at 10a (calling for a "reason[] for exclusion that contain[s] some factual elements"); *id.* at 14a ("While the Gov-

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[7] The majority also ruled that respondent had standing to challenge the notice rules laid out in 8 US.C. 1182(b)(3) "[t]o the extent that the Government relies on" that provision "to interfere with" her due process rights. Pet. App. 24a.

ernment need not prove that Berashk performed an activity that renders him inadmissible under the statute, * * * it must at least allege what it believes Berashk did that would render him inadmissible."). The majority also found insufficient the consular officer's citation to 8 U.S.C. 1182(a)(3)(B) as the basis for inadmissibility, because that provision refers to a number of "different categories of aliens" based on conduct "rang[ing] from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities." Pet. App. 11a-12a. "[A]t a minimum," the majority concluded, "the Government must cite to a ground narrow enough to allow us to determine that it has been properly construed." *Id.* at 12a (internal quotation marks omitted).

In the majority's view, Section 1182(b)(3), in which Congress eliminated the requirement of timely written notice to the alien of the reasons for a visa denial based on security grounds, made no difference to the analysis. Pet. App. 15a. The majority reasoned that that provision does not speak to whether "the Government has an absolute right to withhold the information from everyone, including a citizen and this [c]ourt." *Id.* at 18a. The majority also stated that "nothing in [its] opinion compels dangerous disclosure" that would interfere with the task of barring persons connected with terrorist activities from entering the United States. *Id.* at 20a. According to the majority, "[e]xisting procedures," such as in camera disclosures to a court, "are adequate to address * * * national security concerns." *Id.* at 21a.

ii. Judge Clifton dissented. See Pet. App. 25a-36a. Emphasizing the "highly constrained nature of judicial review of a decision to deny a visa application," *id.*

at 36a, he deemed the reason given for denial of a visa to Berashk facially legitimate because it "was based on a statute" that provided a "lawful" basis for denial, *id.* at 27a (discussing 8 U.S.C. 1182(a)(3)(B)). In addition, he relied on 8 U.S.C. 1182(b)(3), under which "the Government does not have to disclose" any "specific information about what lies behind a visa denial" related to terrorist activities, concluding that "compelling [the Government] to disclose the information anyway in order to allow 'limited' and 'highly restrained' judicial review cannot be justified." Pet. App. 32a; see *id.* at 33a-36a.

SUMMARY OF ARGUMENT

By statute, an alien need not be given an explanation of the basis for a consular officer's denial of his application for a visa if the visa is denied on security-related grounds. See 8 U.S.C. 1182(b)(1) and (3). Under the long-established doctrine of consular non-reviewability, a non-resident alien outside the United States has no right to judicial review of a consular officer's denial of a visa. And under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), a non-resident alien abroad has no constitutional rights in connection with his application for a visa to seek entry to the United States, and therefore no constitutional basis to insist upon an explanation for the denial of the visa or to obtain judicial review of the denial. See *id.* at 762, 766-768; see also, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982).

The Ninth Circuit ruled in this case, however, that respondent—a U.S. citizen who is the spouse of an alien whose visa application was denied on security-related grounds—has a due process right that is implicated by a consular officer's denial of a visa to the

alien. That right, the court reasoned, entitles her to obtain judicial review of the denial of her alien spouse's visa application and to a fuller explanation of the basis for the denial, even though the alien himself has no such rights. Indeed, under the Ninth Circuit's ruling respondent would be entitled not only to learn the specific legal basis for the terrorism-related denial of a visa to her alien spouse but also to discover the "facts" of "what the consular officer believes the alien has done," so that a court can "verify" that a ground for visa ineligibility exists. Pet. App. 9a, 14a.

That ruling is deeply flawed, for several reasons. First, the Ninth Circuit erred in ruling that respondent has a liberty interest, protected by the Due Process Clause, that is implicated by the denial of a visa to her alien spouse abroad. Respondent can derive no such interest from the INA and its implementing regulations. Those provisions establish a two-step process under which a U.S.-citizen spouse has access to procedures in connection with her own petition to USCIS in the United States to classify an alien as a family member who may apply for a visa, but not with respect to the alien's subsequent and distinct application for a visa, which is acted upon by a consular officer abroad based on the alien's own history, health, and other characteristics.

Nor can respondent derive any such interest from the Due Process Clause itself. The denial of an alien's visa application does not interfere with any recognized marriage-related right of his U.S.-citizen spouse. And in the immigration context, where Congress exercises plenary control, there is no basis for claiming constitutional protection for any asserted right to obtain a visa or seek admission for an alien spouse so as to

enable him to be present in the United States and thereby reside with the U.S.-citizen spouse in this country. In addition, because the harm that respondent claims to have experienced is solely "an indirect and incidental result of the Government's enforcement action" with respect to her alien spouse abroad, it "does not amount to a deprivation of any interest in life, liberty, or property" that she possesses in her own right. *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980). Any other conclusion would have sweeping implications, opening the door to constitutional claims by a spouse—or perhaps a child, parent, or even a sibling—whose family member has been removed from the country or convicted of a crime.

Second, even if respondent did have a liberty interest that is implicated in this context, the Ninth Circuit nevertheless erred in concluding that she has a right to judicial review of the consular officer's visa-denial decision and that the government can defend the decision only by providing the specific statutory subsection on which the denial was grounded and the factual basis for believing that the alien falls within the scope of that subsection. Such review has no foundation in the Constitution, and neither Congress nor this Court has ever authorized it. Scrutiny of a consular officer's denial of a visa application simply cannot be reconciled with the deeply rooted doctrine of consular nonreviewability, which bars courts from second-guessing Congress's choices about which aliens abroad should be granted visas and from revisiting decisions about whether aliens who appear before consular officers at far-off posts satisfy the conditions Congress has decreed.

When a visa denial is (as in this case) based on security-related grounds, the review required by the Ninth Circuit is especially unjustified. Such review would fly in the face of the traditional reluctance to intrude on the political Branches' authority in the areas of national security and foreign relations. It also would override Congress's judgment in 8 U.S.C. 1182(b)(3) to protect the confidentiality of sensitive information on which a consular officer may rely in denying a visa, as well as decisions of this Court upholding similar judgments in the immigration context. Moreover, the review mandated by the court of appeals would have serious adverse consequences, leaving an "unprotected spot in the Nation's armor," *Zadvydas* v. *Davis*, 533 U.S. 678, 695-696 (2001) (citation omitted), by threatening disclosure of classified or other sensitive information and by chilling the willingness of various agencies and foreign governments to share with the State Department the kind of intelligence that allows consular officers to prevent terrorists from obtaining visas.

Finally, even if this Court's decision in *Mandel* could somehow be extended to cover the very different circumstances of this case, the disclosure envisioned by the Ninth Circuit could play no proper role in any *Mandel* analysis. That decision emphasized that any attempt to "look behind the exercise of [the Executive's] discretion," *Mandel*, 408 U.S. at 770, was impermissible, and respondent here seeks exactly the kind of inquiry that *Mandel* itself refused to allow.

ARGUMENT

A. The Court Of Appeals Erred In Holding That A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

The Ninth Circuit ruled that respondent—a U.S. citizen who is the spouse of a non-resident alien—has a due process right that is implicated by a consular officer's denial of the alien's visa application. That right, the court held, entitles her to judicial review of the denial of the alien's visa application and a fuller explanation of the basis for the denial—even though the alien himself has no such rights. That ruling is deeply flawed. The INA confers no legally cognizable interest on a U.S. citizen if her alien spouse abroad is denied a visa because he has been found personally ineligible on terrorism (or other) grounds under the INA. Nor does the Due Process Clause itself confer such an interest.[8]

1. Respondent was afforded access to certain procedures under the INA in connection with her own petition, at the first step of the visa process, for classification of Berashk as an immediate relative to whom

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[8] The Ninth Circuit's error in finding that respondent had a constitutionally protected liberty interest implicated by the denial of a visa to Berashk was also the basis for another legal error: its ruling that respondent had standing to challenge the exception in 8 U.S.C. 1182(b)(3). See Pet. App. 22a-24a. The court said that respondent had standing "[t]o the extent" the government relied on that provision "to interfere with" a "constitutionally protected due process right to limited judicial review of her husband's visa denial." *Id.* at 24a. Accordingly, a ruling by this Court that respondent had no constitutional right to judicial review and a more complete explanation of the basis for the visa denial would also resolve that standing question.

a visa could be made available if he was later found admissible in his own right. But she cannot derive from the INA or its implementing regulations any protected interest in connection with Berashk's subsequent and distinct application on his own behalf.

If a qualified "citizen of the United States" files a petition with USCIS to obtain immediate-relative status for an alien, 8 U.S.C. 1154(a)(1); see *Scialabba* v. *Cuellar De Osorio*, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.), and USCIS determines that "the facts stated in the petition are true," then (absent circumstances not at issue here) USCIS "shall * * * approve the petition," 8 U.S.C. 1154(b); see 8 U.S.C. 1151(b). With respect to such a petition, the U.S. citizen is the party who is seeking action from the government. The decision whether to approve the petition generally turns on an assessment of whether the U.S. citizen is qualified to file it, and whether the U.S. citizen in fact has the claimed family relationship to the alien. If the petition is denied, the U.S. citizen can seek administrative reopening or reconsideration, see 8 C.F.R. 103.5, and can appeal an adverse decision to the Board of Immigration Appeals, see 8 C.F.R. 103.3(a), 1003.1(b)(5), 1003.5(b). In this case, respondent's petition was approved, and she therefore received all of the process that she was due under the INA and pertinent regulations with respect to her petition.

But approval of a U.S. citizen's visa petition is not sufficient for the actual issuance of a visa to the alien beneficiary; it merely makes the alien eligible to submit his own application for a visa. See 8 U.S.C. 1201(a), 1202(a) and (e); 22 C.F.R. 42.31, 42.42; see also *Cuellar De Osorio*, 134 S. Ct. at 2198. A consular

officer's decision to grant or deny a visa application filed by an alien abroad, see 8 U.S.C. 1201(a)(1), does not turn on the status of the original petitioner (here, the alien's U.S.-citizen family member), or on the nature of the petitioner's relationship to the alien or her reasons for filing the petition in the first instance. Rather, regardless of whether the alien's ability to *apply* for a visa rests on an approved petition filed by a family member—or on some other basis (such as an approved petition filed by a prospective employer, see 8 U.S.C. 1151(d), 1153(b))—the adjudication of the visa application by a consular officer is based on a close examination of the *alien's* own history, health, associations, criminal record, and other characteristics, in order to determine whether one of the grounds of inadmissibility in the INA might bar the alien's entry into the United States. See 8 U.S.C. 1182, 1201(a), (c), (d), and (g), 1202(a), (b), and (e).

The U.S.-citizen petitioner has no rights under the INA or implementing regulations with respect to the submission and consideration of the alien's visa application. An alien who is the subject of an approved petition need not, of course, apply for a visa at all. If he does apply, the citizen is not entitled under the INA or its implementing regulations to be present at the visa interview, or to obtain notice that the visa has been denied, see 8 U.S.C. 1182(b), or to review any "records of the Department of State and of diplomatic and consular offices of the United States pertaining to the * * * refusal" of the visa, 8 U.S.C. 1202(f). Indeed, in some cases information an alien discloses in his application, or the reasons for the ultimate refusal of a visa, may be of such a sensitive nature that the alien would not wish to reveal them to his own spouse

or family members. See 8 U.S.C. 1182. Nor does the petitioner possess any basis in law to insist or expect that the alien's application will be granted, or any statutory or regulatory right to challenge or appeal a consular officer's denial of the application.

These provisions make clear that the INA and implementing regulations create no legally protected interest in the petitioning U.S. citizen with respect to the alien's separate visa application. See *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (when U.S. sponsors' "petition was granted," their "cognizable interest" under the INA "terminated"); cf. *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977) (rejecting argument that INA provisions relating to petitions by U.S. citizens "grant a 'fundamental right' to American citizens," and characterizing that argument as a "fallacy * * * rooted deeply in fundamental principles of sovereignty" given the "sovereign power to admit or exclude foreigners in accordance with perceived national interests"). To the contrary, the INA and applicable regulations recognize that spouses are independent actors responsible for their own actions and for establishing their own eligibility for government benefits, such as admission to the United States.

2. In ruling that respondent is entitled to due process in her own right with respect to the denial of Berashk's visa application, the court of appeals did not rely on any provision of immigration law. Instead, the court reasoned that respondent possesses a substantive "protected liberty interest in marriage," derived directly from the Due Process Clause, in connection with her alien husband's visa application. Pet. App. 7a; see *id.* at 7a n.1; see also *Bustamante* v. *Mukasey*,

531 F.3d 1059, 1062 (9th Cir. 2008); Br. in Opp. 17-19 (relying on substantive due process cases in asserting that a fundamental liberty interest in marriage is at stake). Although "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005), no such fundamental interest is implicated by this case. In light of Congress's plenary control over the admission of aliens—and Congress's exercise of that power in the INA, which confers no legally cognizable interest in a U.S. citizen with respect to an alien's visa application—there is simply no history in this Nation of recognizing a liberty interest in "the ability to live in the United States with an alien spouse." Pet. App. 7a n.1. And any indirect harm experienced by respondent as a result of the government's denial of Berashk's visa application does not deprive respondent herself of an interest protected by the Due Process Clause.

a. The range of liberty interests protected by the Due Process Clause "is not infinite." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 570 (1972); see *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). Under either a procedural or substantive due process analysis, determining whether an asserted liberty interest is "[a]mong the historic liberties" encompassed by the Clause, *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), requires examination of "[o]ur Nation's history, legal traditions, and practices." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997); see *Reno* v. *Flores*, 507 U.S. 292, 303 (1993) (explaining that to qualify for substantive protection under the Due Process Clause, a liberty interest must be "so rooted in the traditions and conscience of our people

as to be ranked as fundamental") (citations omitted); *Ingraham*, 430 U.S. at 672-675 (citing *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). Such an assessment can be made only by first ascertaining "the precise nature of the private interest" that is allegedly threatened; merely stating a claimed interest in vague or general terms is not sufficient. *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983); see *Glucksberg*, 521 U.S. at 721 (requiring "a 'careful description' of [an] asserted fundamental liberty interest" for purposes of substantive due process analysis) (quoting *Flores*, 507 U.S. at 302); see also *Roth*, 408 U.S. at 570-571.

This Court has recognized a deeply rooted liberty interest, protected by the Due Process Clause, in "rights to marital privacy and to marry and raise a family." *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965); see *Glucksberg*, 521 U.S. at 720 ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry.") (citing *Loving* v. *Virginia*, 388 U.S. 1 (1967)); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-640 (1974) (citing cases regarding decisions to marry and have children to support the proposition that the Due Process Clause protects "freedom of personal choice in matters of marriage and family life"); see also *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 499 (1977) (opinion of Powell, J.). Those rights are "of similar order and magnitude as the fundamental rights specifically protected" in the Constitution. *Griswold*, 381 U.S. at 495.

Those recognized rights, however, are not implicated here. The consular officer's denial of Berashk's visa application did not interfere with respondent's ability to marry him—their marriage was solemnized years before the denial took place. See Pet. App. 3a.

The visa denial did not nullify the marriage, or deprive respondent of the legal benefits the marriage created, or prevent her from living with her spouse anywhere in the world besides the United States. See *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) ("Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage."), cert. denied, 402 U.S. 983 (1971); cf. *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("[Deportation] would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."), cert. denied, 357 U.S. 928 (1958). Nor did the denial of a visa to Berashk prevent respondent from "rais[ing] a family," either in the United States or elsewhere. *Griswold*, 381 U.S. at 495.

Perhaps appreciating that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk, the court of appeals seized on language from *Cleveland Board of Education* v. *LaFleur*, *supra*—a case involving the decision whether to "bear or beget a child," 414 U.S. at 640—that refers to "[f]reedom of personal choice in matters of marriage and family life." Pet. App. 7a & n.1 (citing *Bustamante*, 531 F.3d at 1062 (citing *LaFleur*, 414 U.S. at 639-640)). That vaguely worded passage cannot properly be divorced from the specific issue before this Court. See *Cohens* v. *Virginia*, 19 U.S. (6

Wheat.) 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used"). As invoked by the court of appeals in the wholly distinct context here, that exceedingly general language hardly qualifies as a "precise" or "careful" description of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse's admission to the United States. *Flores*, 507 U.S. at 302; *Lehr*, 463 U.S. at 256.

In reality, there is only one "choice" of respondent's that is directly affected by the denial of a visa to Berashk: her preference that he be admitted to the United States so that she can live in this country with him. See Br. in Opp. 17 (asserting "a constitutionally protected liberty interest in choosing where to live with [one's] spouse"). The court of appeals resisted the suggestion that the review it fashioned was "predicated on a liberty interest in the ability to live in the United States with an alien spouse," insisting that a "more general right" was at issue. Pet. App. 7a n.1. But the court did not explain any basis for its resistance to that suggestion. And in light of the vagueness of the "more general right" on which it purported to rely—and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized—no such basis exists. The "freedom of personal choice" perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. See, *e.g.*, *Swartz*, 254 F.2d at 339 ("[T]he essence of appellants' claim, when it is analyzed, is a right to live in this country."); see also *Silverman*, 437 F.2d at 107.

There is no history in this Nation of recognizing a liberty interest in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the alien from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress's complete discretion, as an exercise of Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*, 408 U.S. at 766 (citation omitted); see generally *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (explaining that the principle "that the formulation" of policies pertaining to the entry of aliens and their right to remain here "is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government," representing "not merely a page of history, but a whole volume") (citation and internal quotation marks omitted).

That power has often been recognized even when Congress's choices or the Executive's enforcement decisions result in separation of family members. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 539, 543-544, 547 (1950) (upholding Executive's right to deny entry to U.S. citizen's alien spouse based on confidential "security reasons" without providing a hearing); see also *Fiallo*, 430 U.S. at 798 (disclaiming any "authority to substitute our political judgment for that of the Congress," even when "statutory definitions deny preferential status to parents and children who share strong family ties"); see generally *Shaughnessy* v. *United States ex rel. Mezei*,

345 U.S. 206, 212 (1953); *Wong Wing* v. *United States*, 163 U.S. 228, 232-234 (1896). Accordingly, in the immigration context, an asserted liberty interest in having an alien spouse admitted to the United States cannot be counted among the "historic liberties," *Ingraham*, 430 U.S. at 673, arising directly from the Fifth Amendment. Decisions of the courts of appeals stretching back many decades have reached the same conclusion, "repudiat[ing]" the existence of a protected liberty interest in living in the United States with an alien spouse (or other alien relative). Pet. App. 7a n.1.[9]

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[9] See, *e.g.*, *Bangura* v. *Hansen*, 434 F.3d 487, 495-497 (6th Cir. 2006) (stating that the "Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country" and that "[a] denial of an immediate relative visa does not infringe upon their right to marry"); *Burrafato* v. *United States Dep't of State*, 523 F.2d 554, 555-557 (2d Cir. 1975) (ruling that "the claim that denial of [the alien's] visa application violated the constitutional rights of [the U.S.-citizen spouse]" was "foreclosed" and that "the failure of the Department of State * * * to specify the reasons for denial of [the alien's] visa application" did not "implicate[]" any "constitutional rights of American citizens over which a federal court would have jurisdiction"), cert. denied, 424 U.S. 910 (1976); see also *Fasano* v. *United States*, 230 Fed. Appx. 239, 240 (3d Cir. 2007) (per curiam). Courts of appeals addressing the issue in removal proceedings have likewise concluded that barring a U.S. citizen's alien spouse from being present in the United States does not implicate any protected liberty interest. See, *e.g.*, *Oforji* v. *Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) ("The law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion and deportation."); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982) ("Mrs. Garcia and the children are United States citizens. The deportation order has no legal effect upon them. It does not deprive them of the right to continue to live in the United States, nor does it deprive them of any constitutional rights."); *Swartz*, 254 F.2d at

To counter that conclusion, respondent has pointed (Br. in Opp. 14-15, 20) to this Court's decision in *Fiallo* v. *Bell*, *supra*, which involved constitutional challenges to statutory provisions governing the system under which U.S. citizens and permanent residents can petition for immediate-relative or other family-related classifications for their alien parents or children. 430 U.S. at 791. But *Fiallo* does not aid respondent's cause. It did not concern review of a consular officer's decision denying an alien's visa application based on the distinct grounds on which an alien may be inadmissible because of his own circumstances. Moreover, as noted above, the decision soundly rejected the proposition that U.S. citizens have a "fundamental right" under the INA to have their alien family members admitted to the United States. *Id.* at 795 n.6; see p. 20, *supra*. The decision also emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792 & n.4 (citation and internal quotation marks omitted). While *Fiallo* recognizes that Congress's decisions embodied in immigration statutes are not always immune from judicial review, it does not suggest the existence of a constitutionally protected liberty interest in marriage that extends to having one's alien spouse admitted to the United States. See *id.* at 793-795 & nn.5-6, 798.

Respondent has also placed heavy reliance (Br. in Opp. 18-19) on *Moore*, *supra*, which recognizes a substantive due process right for a U.S.-citizen grandmother to live in the same household as her U.S.-

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339 ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband."); see also *Payne-Barahona* v. *Gonzáles*, 474 F.3d 1, 2-3 (1st Cir. 2007).

citizen grandson. See 431 U.S. at 499 (opinion of Powell, J.) (explaining that a State cannot enter into the private realm of family life so as to make "a crime of a grandmother's choice to live with her grandson"). But *Moore* does not speak to the nature of a citizen's liberty interests in an immigration context. To the contrary, the purported liberty interest in living in this country with a non-resident alien who has been deemed inadmissible and denied a visa "is one far removed from the right of United States citizens to live together as a family." *Morales-Izquierdo* v. *DHS*, 600 F.3d 1076, 1091 (9th Cir. 2010). *Moore*'s holding is grounded in history and tradition. See 431 U.S. at 503-505 & n.12 (opinion of Powell, J.) (finding "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" to be "deserving of constitutional recognition" because of its "venerable" roots) (footnote omitted). No such grounding exists with respect to the wholly distinct liberty interest that respondent claims.

That analysis does not, as respondent has insisted (Br. in Opp. 16-17), erroneously conflate the question of the existence of an asserted liberty interest with the question of the strength of the government's regulatory interest. Rather, it recognizes that where the government's regulatory powers have "tradition[ally]" been absolute, as is true of the admission of aliens, the asserted interest could never have taken sufficient "root[]" in the first place to enjoy protection arising directly from the text of the Due Process Clause itself. *Ingraham*, 430 U.S. at 672-675; *Flores*, 507 U.S. at 303; see generally *Mandel*, 408 U.S. at 770 (stating that in the visa context there is no call to "balanc[e]"

the government's "justification" for its action against the interests of a U.S. citizen).

b. Respondent's contention that the denial of a visa to her alien spouse implicates her own liberty interests under the Due Process Clause suffers from another fatal flaw: it cannot be reconciled with the long-standing principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980).

As this Court explained in *O'Bannon*, due process jurisprudence has long drawn a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," and has rejected the notion that the latter sort of action can be said to have interfered with the citizen's constitutionally protected liberty or property interests. *O'Bannon*, 447 U.S. at 788-789 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (stating that the Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals").

The plaintiffs in *O'Bannon* were nursing home residents who claimed that their liberty interests under the Due Process Clause had been violated when the government decertified the home in which they lived, thereby forcing them to move, without affording them a hearing on the decertification decision. See 447 U.S. at 777-781, 784, 787. The Court recognized that decertification could have "an immediate, adverse impact on some residents," but ruled that the government's enforcement of "valid regulations" against the nursing

home "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 787, 790; see *id.* at 787 (contrasting such an indirect impact with "the withdrawal of direct benefits" to the residents themselves). In the Court's view, the residents were in a position "comparable to that of members of a family who have been dependent on an errant father; they may suffer serious trauma if he is deprived of his liberty or property as a consequence of criminal proceedings, *but surely they have no constitutional right to participate in his trial or sentencing procedures.*" *Id.* at 788 (emphasis added); see, *e.g.*, *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 766-768 (2005).

The principle that "an indirect and incidental result of the Government's enforcement action * * * does not amount to a deprivation of any interest in life, liberty, or property," *O'Bannon*, 447 U.S. at 787, is fully applicable to this case, and it defeats respondent's claim that she has been deprived of any protected liberty interest. The United States has taken no adverse action against respondent herself; indeed, DHS approved respondent's petition to have Berashk classified as an alien who may apply for an immigrant visa. Respondent's only complaint is that an adverse decision solely concerning her spouse—the denial of his visa application, based on his own failure to satisfy the qualifications for obtaining a visa under the INA—has had a ripple effect, depriving her of her husband's company so long as she elects to remain within the borders of the United States. That is exactly the kind of "indirect and incidental" harm, *ibid.*, that this Court has held "does not amount to a deprivation of any interest in life, liberty, or property," *ibid.*; see *id.*

at 789-790. In the face of this Court's precedents, the Ninth Circuit's ruling that "the denial of a spouse's visa" impinges upon a U.S. citizen's "protected liberty interest in marriage" under the Due Process Clause, Pet. App. 7a, cannot be sustained.

c. The Ninth Circuit's due process ruling would have sweeping implications. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is deemed inadmissible at the border or is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of serious crimes, or ties to terrorist activity. See, *e.g.*, 8 U.S.C 1227. And, because the constitutional right that the Ninth Circuit posited covers "personal choice" not just in "marriage" but also in "family life" more generally, Pet. App. 7a n.1 (citation omitted), such claims might also be asserted by U.S.-citizen children, parents, or even siblings whose alien family members have been deemed inadmissible to or removed from the United States. That result would work a sea change in the law, creating obstacles to the government's exercise of its plenary power over the Nation's borders and burdening the courts. See, *e.g.*, *Morales-Izquierdo*, 600 F.3d at 1091.[10]

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[10] According to the Department of State, during fiscal year 2013, consular officers denied 112,405 visa applications under 8 U.S.C. 1182(a), *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the [INA]), Fiscal Year 2013, Table XX*, http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf (last visited Nov. 19, 2014), of which more than 1200 were filed

Moreover, by breaking down the long-accepted "distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," *O'Bannon*, 447 U.S. at 788, the Ninth Circuit's ruling would open the door to a host of constitutional claims outside the immigration context. If government action directed solely at respondent's alien spouse gave rise to a claim on respondent's part that her protected liberty interests have been infringed, "it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service." *Payne-Barahona* v. *Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007); cf. *Flores*, 507 U.S. at 301-303. Indeed, in support of her position in this case, respondent has embraced the very notion that such due process rights exist and that such claims may be brought. See Br. in Opp. 21 n.4 (stating that children "certainly would have" a constitutional right to challenge a parent's imprisonment). That state of affairs would overturn more than a century of precedent, see *O'Bannon*, 447 U.S. at 788-789, and flood the courts with suits by plaintiffs who claim a species of constitutional injury that has never previously been cognizable.

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by aliens on the basis of their engagement or marriage to a U.S. citizen and were denied on Section 1182(a)(2) or (3) grounds.

B. The Court Of Appeals Erred In Imposing Judicial Review And Notice Requirements On A Consular Officer's Visa Determination

The Ninth Circuit's decision is fundamentally flawed for additional reasons. Relying on the conclusion in *Mandel* that a "facially legitimate" exercise of discretion is sufficient (assuming that some judicial review of the denial of a waiver of inadmissibility is available at all), the court of appeals imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on security and related grounds identified by Congress. The court mandated a disclosure that would permit plaintiffs like respondent to obtain information not only about the legal basis for a terrorism-related denial of a visa to an alien spouse but also about the "facts" of "what the consular officer believes the alien has done." Pet. App. 9a, 14a. That ruling cannot be reconciled with this Court's precedents, including *Mandel* itself, or with Congress's judgment that visas refusals are not to be subject to judicial review or that the reasons for such refusals may remain undisclosed. Moreover, the notice requirements imposed by the court of appeals would give rise to serious national-security-related harms.

1. The doctrine of consular nonreviewability has deep roots in the law. For virtually as long as Congress has required immigrants to present documentation when arriving at a port of entry, see Immigration Act of 1924, Pub. L. No. 68-139, § 2(f), 43 Stat. 154 ("No immigration visa shall be issued to an immigrant if it appears to the consular officer * * * that the immigrant is inadmissible to the United States under the immigration laws."), courts have recognized that

an alien has no right to challenge the refusal of a visa by a consular officer in the absence of affirmative congressional authorization. See, *e.g.*, *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984, 986 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929); see also, *e.g.*, A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 Am. J. Int'l L. 737, 742 (1924) ("Absolute authority to refuse the visa is vested in consular officials."); Note, *Right of an Alien to a Fair Hearing in Exclusion Proceedings*, 41 Harv. L. Rev. 522, 522 n.7 (1928) ("The denial of a visa by a consular officer will not be reviewed by the courts."). That principle has become deeply embedded in judicial decisions, including decisions by this Court. See, *e.g.*, *Mandel*, 408 U.S. at 769-770; *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956) (declining to suggest that "an alien who has never presented himself at the border of this country may avail himself of [a] declaratory judgment action by bringing the action from abroad"); see also, *e.g.*, *Knauff*, 338 U.S. at 543; *Saavedra Bruno*, 197 F.3d at 1160, 1162 (discussing nonreviewability doctrine's history and collecting cases).

Powerful justifications support the preclusion of judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission to the United States. First, the consular nonreviewability doctrine is a necessary corollary of the principle that the political Branches have plenary power to make rules for the admission of aliens and to exclude those who do not qualify under those rules. See pp. 7, 25-26, *supra*; see also, *e.g.*, *Oceanic Steam*

Navigation Co. v. *Stranahan*, 214 U.S. 320, 339 (1909) (stating that "over no conceivable subject is the legislative power of Congress more complete"); see also *Knauff*, 338 U.S. at 542, 544 (stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," and that "[w]hen Congress prescribes a procedure concerning the admissibility of aliens," it is not only "dealing * * * with a legislative power" but also "implementing an inherent executive power"); *Mezei*, 345 U.S. at 210 (stating that this area of the law is "largely immune from judicial control"). That power is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Mandel*, 408 U.S. at 765; see *Knauff*, 338 U.S. at 542; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892); see also *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (explaining that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government").

This Court has therefore long held—including in decisions that predate the visa system—that "[t]he power of Congress to * * * prescribe the terms and conditions upon which [aliens] may come to this country, *and to have its declared policy in that regard enforced exclusively through executive officers*, without judicial intervention, is settled by our previous adjudications," even in cases in which there is some question about whether the alien falls within "a class forbidden to enter the United States." *Wong Wing*,

163 U.S. at 232-234 (emphasis added); see *Harisiades*, 342 U.S. at 588-589.

Second, Congress has repeatedly acknowledged the consular nonreviewability doctrine and chosen to leave it undisturbed. When putting the visa system into place in 1924, Congress understood that no form of review would be available to challenge a consular officer's denial of a visa. See H.R. Rep. No. 176, 68th Cong., 1st Sess. Pt. 2, at 10 (1924) (view of minority); 65 Cong. Rec. 5466 (1924). When Congress drafted the INA in 1952, there were suggestions to authorize judicial review of visa denials or to create "a semijudicial board * * * with jurisdiction to review consular decisions pertaining to the granting or refusal of visas," H.R. Rep. No. 1365, 82d Cong., 2d Sess. 36 (1952) (House Report); see S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950). But Congress declined to enact any such procedure. As a Senate Report explained, although "[o]bjection has been made to the plenary authority presently given to consuls to refuse the issuance of visas," allowing "review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws. * * * [T]he question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer." S. Rep. No. 1515, at 622. And in 1961, when the INA was amended to authorize judicial review of determinations affecting aliens in the United States subject to deportation or exclusion proceedings, Congress provided no corresponding right to judicial review for aliens outside the United States claiming some right to enter. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651; see also

H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961) (stating that "[t]he sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States"); see also 8 U.S.C. 1201(i) (allowing judicial review of visa revocations, as distinguished from initial visa denials, but only in proceedings to remove an alien who is in the United States and when "revocation provides the sole ground for removal").[12]

It is within Congress's power to provide for some judicial (or administrative) review of a consular officer's refusal of a visa. But no statutory provision of that nature exists, see pp. 7-8, *supra*, or has ever existed, and the whole history of the immigration laws therefore reflects a congressional judgment that no such judicial examination should take place. "[U]nless expressly authorized by law," it is "not within the province of any court * * * to review the determina-

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[12] Congress has also made clear that various subsequent enactments should not be interpreted to provide a basis for judicial review of consular officers' visa decisions. See, *e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, § 428(b), (e), and (f), 116 Stat. 2187-2190 ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."); Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 206, 114 Stat. 1643-1644 (amending 8 U.S.C. 1187(c)). And Congress has failed to enact numerous bills proposing to establish a board within the Department of State to review consular officers' visa decisions. See, *e.g.*, H.R. 3305, 103d Cong., 1st Sess. (1993); H.R. 2975, 104th Cong., 2d Sess. (1996); H.R. 4539, 105th Cong., 2d Sess. (1998); H.R. 1345, 107th Cong., 1st Sess. (2001).

tion of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543.

2. *Mandel* was decided against the backdrop of—and articulated justifications for—the long-standing consular nonreviewability doctrine. See 408 U.S. at 765-767. Contrary to the ruling below, see Pet. App. 6a-7a & n.1, *Mandel* did not authorize judicial review of a consular officer's denial of a visa, and there is no basis for recognizing any right to judicial review of such a decision.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain very limited review of the Attorney General's discretionary denial of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application by a consular officer. See 408 U.S. at 765, 770. In that narrow context, the Court concluded that the reason for the Attorney General's denial of the waiver that appeared in the record was "facially legitimate and bona fide" and that it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason at all. See *id.* at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.").

That narrow decision cannot be transmuted into a warrant for judicial review of a decision made by a

consular officer abroad to deny an alien a visa. A rationale that might support limited judicial review of a discretionary waiver of a ground of inadmissibility by the Attorney General—and the Court in *Mandel* did not hold that there was a right of judicial review even then—simply does not extend to the underlying decision that such a ground for denying a visa applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision not to issue a visa because an alien is ineligible must, by definition, be tethered to the legal provisions that define the alien's ineligibility. See, *e.g.*, 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are "facially legitimate"; those reasons are legitimate on their face by their very nature because Congress has prescribed them.

Attempting to examine the "facial[] legitima[cy]" of a statutorily grounded determination by a consular officer would ultimately put courts in the untenable position of second-guessing Congress's choices about which aliens abroad should and should not be granted visas as well as decisions by consular officers at distant posts about whether individual aliens who appear before them satisfy the conditions Congress has laid down. Such a task is outside the judiciary's realm; it cannot be reconciled with the consular nonreviewability doctrine and the fundamental principles that undergird it. That conclusion is not altered by the fact that Congress's choices might have an indirect effect on an alien's U.S-citizen family members or other persons in this country. A congressional decision to permit some aliens to be admitted and require other

aliens to be excluded—and consular officers' application of those criteria—is a line-drawing exercise that will keep some family members apart and prevent some citizens who "would wish to meet and speak with" an ineligible alien from fulfilling that goal. *Mandel*, 408 U.S. at 768; see *id.* at 765-767; *Fiallo*, 430 U.S. at 792-795. That incidental consequence has never been thought to undermine Congress's plenary power to make those kinds of decisions or to vest consular officers with the authority to make final determinations in such matters abroad.

Accordingly, extension beyond the discretionary waiver context of the language in *Mandel* is not justified. See 408 U.S. at 767 ("[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision."); cf. *Saavedra Bruno*, 197 F.3d at 1161-1165 (acknowledging distinction between consular officer's visa denial and Attorney General's refusal to waive applicable grounds of inadmissibility); but see *American Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009). Because the decision of a consular officer to refuse a visa was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny.

3. In any event, *Mandel* did not require the government to supply a reason that did not already appear in the record of a case so that a court could scrutinize that reason and determine whether it was sufficiently valid. See 408 U.S. at 769-770. But that is exactly what the Ninth Circuit required here when it ruled that the government must identify the precise subsection of 8 U.S.C. 1182(a)(3)(B) under which the

visa application was denied and the factual basis for the determination of inadmissibility. Pet. App. 7a-21a. There is no basis in the Constitution to mandate disclosure or judicial review of such information.

a. By statute, the government is generally required to provide an alien whose visa application has been denied with a statement of the determination and "the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). That notice provision does not apply, however, when the alien is found inadmissible on "[s]ecurity and related grounds," which include "terrorist activity," or on "[c]riminal and related grounds." See 8 U.S.C. 1182(a)(2), (a)(3), and (b)(3). Congress adopted that exception to the statutory notice requirement as part of a subtitle of the Antiterrorism and Effective Death Penalty Act of 1996 entitled "Exclusion of Members and Representatives of Terrorist Organizations," Pub. L. No. 104-132, Tit. IV, Subtit. B, 110 Stat. 1268, in order to ensure that "no explanation of the denial need be given to aliens excluded on the basis of their terrorist or other criminal activity," H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 116 (1996).[13]

When the government invokes the protections of Section 1182(b)(3) to limit the information supplied to an alien whose visa application has been denied under

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[13] Other statutory provisions also protect from disclosure records pertaining to visa decisions. See 8 U.S.C. 1202(f) (providing that such records "shall be considered confidential" and may "in the discretion of the Secretary of State" be "made available to a court" only in limited circumstances); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 744 (D.C. Cir. 1983) (applying Section 1202(f) to "information revealing the thought-processes of those who rule on the [visa] application").

Section 1182(a)(3) on security or related grounds, it does so for national-security or foreign-policy reasons. Deference to the political Branches is at its zenith in matters of national security and foreign affairs. See *Wayte* v. *United States*, 470 U.S. 598, 611-612 (1985) (stating that "[f]ew interests can be more compelling than a nation's need to ensure its own security"); see also *Zadvydas* v. *Davis*, 533 U.S. 678, 695-696 (2001) (recognizing that "terrorism or other special circumstances" can warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations") (citation and internal quotation marks omitted). "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981)); *Harisiades*, 342 U.S. at 588-589 (noting that the political Branches' immigration-related powers are "intricately interwoven" with foreign relations and war powers).

In keeping with that principle, decisions of this Court recognize that the government is entitled to shield information relating to the entry of aliens that "would itself endanger the public security," *Knauff*, 338 U.S. at 544—the very concern on which Section 1182(b)(3) is based. For instance, in *Mezei*, *supra*, the

Court considered the constitutionality of the exclusion of an alien on security-related grounds. See 345 U.S. at 207. A regulation then in effect provided that the Attorney General could deny a hearing to aliens excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." *Id.* at 212 n.8. The Court emphasized that in an exclusion case Congress dictates the relevant procedures. See *id.* at 212. And "because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.'" *Ibid.* (quoting *Knauff*, 338 U.S. at 543). The Court therefore ruled that "the Attorney General may lawfully exclude [the alien] without a hearing as authorized by the * * * regulations * * * Nor need he disclose the evidence upon which that determination rests." *Id.* at 214-215; see, *e.g.*, *Knauff*, 338 U.S. at 544 (rejecting challenge by excluded alien spouse of U.S. citizen to regulations under which the Attorney General could deny a hearing to such an alien when he "concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States" and "the disclosure of the information on which he based that opinion would itself endanger the public security").

A fortiori, disclosure is not required when, unlike in *Mezei* and *Knauff*, the alien has not reached our shores and has simply applied for a visa abroad. See H.R. Rep. No. 383, 104th Cong., 1st Sess. 102 (1995)

("An alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege.") (quoted in Pet. App. 16a n.5).

In the face of Section 1182(b)(3) and this Court's precedents, the court of appeals supported its requirement that the government come forward with detailed information about the denial by citing to *Mandel*, which it characterized as holding that "the Government *must* put forward a 'facially legitimate *and* bona fide reason'" when a U.S. citizen's constitutional rights are implicated. Pet. App. 22a (first emphasis added). But *Mandel* held no such thing. Indeed, the Court was careful to explain that its decision in that case "neither address[ed] nor decide[d]" what constitutional grounds may be available for attacking a waiver decision "for which no justification whatsoever is advanced." 408 U.S. at 770. *Mandel* therefore does not supply any authority for requiring the government to divulge information it has deemed too sensitive to disclose.

Nor is there any basis to expand the ruling in *Mandel* to require that national-security information (or other sensitive information) relating to denial of a visa to the alien himself be provided to a third party, including a U.S. citizen claiming an interest in the visa denial. Any right of such a citizen that could conceivably be implicated in such a circumstance is not powerful enough to overcome the traditional reluctance to intrude on the political Branches' authority in the areas of national security and foreign relations. See, *e.g.*, *Egan*, 484 U.S. at 530; Resp. Br. at 16, *Mandel*, *supra* (No. 71-16) (concession by U.S.-citizen plaintiffs that when Congress or the Secretary of State "de-

cide[s] to exclude an alien to achieve a national security or foreign policy objective, First Amendment rights of citizens cannot override that decision"). In that setting, all of the justifications for the consular nonreviewability doctrine apply with special force.

Any other conclusion would amount to an end run around Section 1182(b)(3) and this Court's decisions in *Mezei* and *Knauff*, and would ultimately vitiate the rule those authorities establish. A significant number of aliens whose visas are denied under Section 1182(a)(2) or (a)(3) have U.S.-citizen family members who might assert the same purported due process right on which respondent relies. See, *e.g.*, note 10, *supra*; see also *Mandel*, 408 U.S. at 768. Surely when Congress enacted Section 1182(b)(3), it did not envision that an alien would be able to obtain the very information that the statute seeks to shield from the alien's knowledge merely through the expedient of having a U.S. citizen—a spouse, or perhaps even another family member—request it. And surely the holdings of *Mezei* and *Knauff* could not be overcome simply by having the alien's spouse seek judicial aid in obtaining "information of a confidential nature, the disclosure of which would be prejudicial to the public interest," *Mezei*, 345 U.S. at 212 n.8, to which the alien himself is not entitled. That is especially so where the alien, like Berashk here but unlike the aliens in *Mezei* and *Knauff*, remains outside the United States and is not seeking admission at a port of entry. The restrictions reflected in those authorities are grounded in security concerns too vital to be so easily circumvented.

b. By requiring the government to come forward with a detailed reason for the visa refusal that has

been properly withheld from the alien himself, the Ninth Circuit's decision threatens to interfere with U.S. national-security and foreign-policy interests in a number of different respects. Those serious adverse consequences, which would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (citation omitted), counsel strongly against creating a disclosure requirement that the *Mandel* Court did not adopt and then subjecting the consular decision-making to judicial scrutiny.

First, the type of disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing national-security or law-enforcement investigation. Furnishing such information to an alien's U.S.-citizen spouse (or perhaps even his parent, child, or sibling)—who is very likely to pass on the information to the alien and his associates—could jeopardize the national security, the public safety, or the safety of individual intelligence or other personnel in the field by revealing information specific to the alien or classified sources and methods more generally. See generally *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320-321 (1936) ("[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."). Even small pieces of information that may appear innocuous in isolation can be fitted into a bigger picture by a terrorist or criminal organization, providing insight into the gov-

ernment's patterns of investigation and its knowledge (or lack of knowledge) of a particular group's activities or plans. See generally *CIA* v. *Sims*, 471 U.S. 159, 178 (1985) ("What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.") (citations omitted). It is for these reasons—to protect the government's ability to keep confidential information about security- or crime-related investigations from targets or their associates and to protect law-enforcement and intelligence sources and methods—that Congress authorized consular officers to withhold notice of the ground for a visa denial in the first place. See 8 U.S.C. 1182(b)(3); see H.R. Rep. No. 383, at 101-102; see also 8 U.S.C. 1202(f) (providing that visa records "shall be considered confidential"); House Report 55 (describing "information of a confidential nature" as being information "the disclosure of which would be prejudicial to the interests of the United States").

Those concerns arise not only from the Ninth Circuit's requirement that the government disclose "facts" about "what the consular officer believes the alien has done," Pet. App. 9a, 14a, but also from its insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see Pet. App. 12a-15a. For example, the government's disclosure to a U.S. citizen that it has reason to believe that her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make edu-

cated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, the requirement imposed by the Ninth Circuit would have a chilling effect on the sharing of national-security information among federal agencies and between the United States and foreign countries. Visa ineligibility determinations are frequently based on information that other agencies or entities, including foreign governments and officials, provide to the Department of State. See, *e.g.*, 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States").[14]

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[14] See also, *e.g.*, 8 U.S.C. 1105(b)(1) (giving the State Department access to criminal history information maintained by other U.S. agencies); 8 U.S.C. 1187(c)(2)(F) (discussing information sharing with foreign countries with respect to individuals who "represent a threat to the security or welfare of the United States or its citizens"); 8 U.S.C. 1202(f)(2) (confidentiality of visa records);

Some of that information is reflected in State Department records that are routinely consulted when adjudicating visa applications, or are provided to consular officers by sources local to the consular post. Consular officers encountering visa applicants who might have terrorism-related or other security-related ineligibilities also obtain additional information needed to adjudicate the visa application by requesting a Security Advisory Opinion from the State Department, which undertakes an extensive review of all relevant information—including classified information—known to the Department or other agencies or sources. See, *e.g.*, *Eleven Years Later: Preventing Terrorists from Coming to America: Hearing Before the Subcomm. on Border and Maritime Security of the House Comm. on Homeland Security*, 112th Cong., 2d Sess. 29-36 (Sept. 11, 2012) (statement of Edward J. Ramotowski).

If consular officers were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, the State Department might well never receive all of the information relevant to enforcing the INA and protecting the national security. Certain foreign sources of information, in particular, may have strong interests in avoiding any action that might tend to reveal their assistance to the United States. Cf. *Sims*, 471 U.S. at 175 ("If potentially valuable intelligence sources come to think that the [CIA] will be unable to maintain the confidentiality of its relationship to them,

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22 U.S.C. 4807 (program for visa and passport security); H.R. Doc. No. 131, 108th Cong., 1st Sess. (2003); Exec. Order No. 13,388, 3 C.F.R. 198 (2006); Exec. Order No. 13,354, 3 C.F.R. 214 (2005).

many could well refuse to supply information to the Agency in the first place."). If consular officers were then forced to act upon aliens' visa applications without the Department of State or consular posts receiving pertinent information, the ineligibility criteria established by Congress would not be rigorously enforced, and the threat to national security would be grave indeed. See, *e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report* 384 (July 22, 2004) ("For terrorists, travel documents are as important as weapons."); *Visa Issuance and Homeland Security: Hearings Before the Subcomm. on Immigration, Border Security and Citizenship of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 141 (July 15, 2003) (testimony of Janice L. Jacobs) (stating that "swift provision of all the best information known to the US government from whatever source to our line visa officers is essential to ensure that we stop * * * dangerous persons" such as the 9/11 hijackers from entering the United States).

Respondent has noted (Br. in Opp. 31) that consular officers sometimes do disclose information to aliens whose visas are denied for terrorism-related (or crime-related) reasons. But that hardly suggests that the Constitution requires the government to make a particularized disclosure in every case in which a U.S.-citizen spouse demands one, even when it is the view of those who are familiar with intelligence reporting and terrorism trends and patterns that such a disclosure would cause harm to national security or foreign relations. See *Humanitarian Law Project*, 561 U.S. at 34. When disclosure of information to the alien is made, it reflects a considered determination that the

information provided does not require invoking the protections of Section 1182(b)(3).

Contrary to the Ninth Circuit's suggestion (Pet. App. 21a), harm to the United States caused by the court of appeals' new disclosure requirements could not be ameliorated by providing information about the reasons for a visa denial to a district court in camera "if necessary." There are no established procedures for mandated disclosures in this setting, and the panel's ruling is vague about exactly what "procedures" should be followed and under what circumstances. *Ibid.* The use of classified information poses various substantive and procedural issues. Courts have been reluctant to "dispose of the merits of a case on the basis of *ex parte, in camera* submissions," and questions would arise concerning access to the information by plaintiffs or their counsel. See, *e.g.*, *Abourezk* v. *Reagan*, 785 F.2d 1043, 1060-1061 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987); see also, *e.g.*, *Jifry* v. *FAA*, 370 F.3d 1174, 1180-1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005). Widening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure. See *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (recognizing inherent risks of disclosures of sensitive information even through in camera proceedings).

The sort of regime of judicial review of terrorism-related grounds for barring an alien from the United States envisioned by the Ninth Circuit would therefore likely disrupt the government's efforts to enforce the immigration laws and to safeguard national security. Notably, while even one mandated disclosure of sensitive information could be very damaging, a sig-

nificant number of visa applications every year could be affected. See note 10, *supra*. While some refusals of visas on Section 1182(a)(2) or (a)(3) grounds to aliens with U.S.-citizen spouses do not involve sensitive criminal or national-security information, a meaningful number of them would. Under these circumstances, the risks created by the Ninth Circuit's ruling—risks that neither Congress nor this Court has ever previously been willing to accept—are too great to be countenanced.

c. In this case, finally, the consular officer did supply a "facially legitimate" reason for the denial of Berashk's visa application: the fact that he is ineligible under Section 1182(a)(3)(B). *Mandel*, 408 U.S. at 769-770; see Pet. App. 27a-28a (Clifton, J., dissenting); *id.* at 44a. For all the reasons set forth above, there is no basis for requiring the government to detail why the consular officer decided that the provision was applicable. And the prospect of such disclosure—with all of its attendant harms—could not in any event play any proper role in a *Mandel* analysis. Any determination by a court that the information in the government's hands was actually insufficient to give the consular officer "reason to believe" that Berashk fell into one of the statutory categories of visa ineligibility, 8 U.S.C. 1201(g), would amount to exactly the kind of review that the *Mandel* Court deemed impermissible.

In *Mandel*, the Court noted that "the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by [the alien]" in connection with previous waivers "made it inappropriate to grant a waiver again." 408 U.S. at 769; see *id.* at 758 (noting assertion that previous

waivers had required the alien to "limit his activities to the stated purposes of his trip" but that "he had engaged in activities beyond the stated purposes"). "With this," the Court explained, "we think the Attorney General validly exercised the plenary power that Congress delegated to the Executive." *Id.* at 769. The Court did not require any further explanation, or inquire whether the alien had indeed engaged in the claimed bad acts—even in the face of a vigorous dissent contending that "the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham." *Id.* at 778 (Marshall, J., dissenting); see *ibid.* ("There is *no* basis in the present record for concluding that [the alien's] behavior on his previous visit was a 'flagrant abuse'—or even willful or knowing departure—from visa restrictions. * * * In these circumstances, the Attorney General's reason cannot possibly support a decision for the Government in this case."). Rather, the Court emphasized that it was inappropriate to "look behind the exercise of [the Executive's] discretion." *Mandel*, 408 U.S. at 770.

Respondent here seeks exactly what *Mandel* refused to allow—a "peek behind" the challenged decision, 408 U.S. at 778 (Marshall, J., dissenting), in the hope that she will be able to muster an argument that the consular officer reached an erroneous decision, see Pet. App. 14a (calling for courts to "verify" that facts of a particular case "constitute a ground for exclusion under the statute"). Under *Mandel*, a court is not entitled to "look behind" the exercise of the consular officer's responsibilities in that fashion. See *Humanitarian Law Project*, 561 U.S. at 34 (characterizing tasks that involve drawing "factual inferences" in the

"national security" context as ones as to which "the lack of competence on the part of the courts is marked") (citation omitted). Because the visa application submitted by respondent's alien spouse abroad was denied by the consular officer on the basis of a nondiscretionary reason set forth in Section 1182(b)(3)(B), neither *Mandel* nor any other relevant authority permits any further inquiry—even if, contrary to our submission, respondent had a right to obtain judicial review of the consular officer's decision at all.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the

aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder

with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to

believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organi-

zation that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the

United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States un-

der clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for

admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or

sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is inadmissible.

* * * * *

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment[4] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

* * * * *

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[4] So in original. Probably should be preceded by "ineligible for"

RESPONDENT'S BRIEF

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No. 13-1402

IN THE

Supreme Court of the United States

JOHN F. KERRY, *et al.*,

Petitioners,

v.

FAUZIA DIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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January 12, 2015

QUESTIONS PRESENTED

1. Whether the refusal of a visa to a U.S. citizen's alien spouse impinges upon a constitutionally protected interest of the citizen.

2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions of 8 U.S.C. § 1182 contained in the appendix to Petitioner's Brief, the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides that "No person shall be deprived of life, liberty, or property, without due process of law."

INTRODUCTION

A citizen's right to marry necessarily encompasses the right to live with one's spouse. The Constitution protects marital rights because marriage is the foundation of the family and of society. Because marital rights are deeply rooted in this nation's history, the Due Process Clause bars the government from arbitrarily separating a married couple.

An arbitrary restriction occurs when the Executive precludes a couple from residing together, without providing a facially legitimate, bona fide reason for doing so. This Court has never allowed the government to escape all judicial review of an arbitrary invasion of a citizen's constitutional rights. In immigration cases, as in other contexts, this Court has consistently upheld a citizen's right to judicial review, and has tailored the standard of judicial review to the deference owed to Congress or the Executive. That approach comports with the immigration laws, which do not bar judicial review of constitutional claims and have long promoted spousal unification.

STATEMENT OF THE CASE

I. BACKGROUND

1. Immigration law reflects Congress's judgment that the "preservation of the family unit" benefits the

United States. H. Rep. No. 82-1365, at 29 (1952). This judgment dates to 1907, when Congress gave preferential treatment to wives and minor children of permanent residents seeking to enter the United States. Whereas other aliens were excluded if afflicted with "a loathsome or dangerous contagious disease," wives and children of permanent residents who appeared ill were detained for further examination at a hospital, and then admitted if their disorder was "easily curable" or they could land "without danger to other persons."[1] In 1924, Congress provided additional protection to families by granting visa preferences to wives and minor children of U.S. citizens.[2] Congress expanded the preferential treatment to all spouses and children of U.S. citizens in 1952, when it enacted the Immigration and Nationality Act (INA). Acknowledging the longstanding "underlying intention of our immigration laws regarding the preservation of the family unit," Congress accorded U.S. citizens "the right to bring [their] alien spouse (wife or husband)" and children as "nonquota" immigrants, that is, not subject to the numerical quotas that otherwise severely limit the number of immigrants each year.[3]

Although Congress has amended the INA many times since 1952, "family reunification" continues to be a "cornerstone of U.S. immigration policy." H. R.

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[1] *Compare* Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898-99 (exclusion of aliens with diseases), *with id.* § 37, 34 Stat. at 908 (preferential treatment of wives and children of permanent residents); *see also* Immigration Act of 1917, ch. 29, § 22, 39 Stat. 874, 891-92 (same).

[2] Immigration Act of 1924, ch. 190, §§ 4(a), 6(a), 43 Stat. 153, 155.

[3] H. R. Rep. No. 82-1365, at 29; *see* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(27)(A), 66 Stat. 163, 169 (1952).

Rep. No. 101-723(I), at 40 (1990). To ensure "that the family unit may be preserved as much as possible," in 1965 Congress expanded the system of giving preferential visas to include parents of U.S. citizens. S. Rep. No. 89-748, at 13 (1965); see also H. R. Rep. No. 89-745, at 12 (1965) (same). For fifty years, the law has allowed spouses and children of U.S. citizens, and parents of adult U.S. citizens, to "be issued immigrant visas" without regard to otherwise applicable quotas. 8 U.S.C. § 1151(a), (b)(2)(A)(i). As President Johnson said when signing this provision into law, it is unfair to keep families "apart because a husband or wife or child had been born in the wrong place." L. Johnson, *Remarks at the Signing of the Immigration Bill, Liberty Island, New York* (Oct. 3, 1965), http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp.

2. A citizen who seeks to have her spouse join her in this country files a petition (Form I-130) with the United States Citizenship and Immigration Services (USCIS). If the citizen's petition is approved, her spouse then applies for an immigrant visa based on his status as her "immediate relative." 8 U.S.C. §§ 1201(a)(1)(A), 1202(a), 1204. Her involvement does not end, and her interest in the admission of her spouse does not terminate, with the granting of the I-130 petition. Cf. Pet. Br. 18-20. The government can require additional information from the citizen in connection with her spouse's visa application. See 8 U.S.C. §§ 1182(a)(4), 1183a; 8 C.F.R. § 213a.2. In addition, the citizen retains the unilateral right to withdraw her petition at any time before her spouse is admitted, 8 C.F.R. § 103.2(b)(6); 9 F.A.M. § 42.43 n.2. If she does so, or (with limited exceptions) if the couple gets divorced or the U.S. citizen dies, the citizen's petition is immediately revoked, which has the

effect of terminating the alien's application for entry based on "immediate relative" status. See 8 C.F.R. § 205.1(a)(3)(i)(A), (C), (D); see also 8 U.S.C. §§ 1201(a), 1204.

Consular officers are generally responsible for the issuance of a visa. See 6 U.S.C. § 236(b)-(c); 8 U.S.C. §§ 1104(a)(1), 1201(a). Their review includes applying 8 U.S.C. § 1182, which states grounds for ineligibility for admission. A consular officer may refuse a visa under Section 1182 only if it appears from the application, or if the consular officer "knows or has reason to believe," that a statutory ground for ineligibility applies. 8 U.S.C. § 1201(g)(1), (3). The implementing regulation defines "reason to believe" as "a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible." 22 C.F.R. § 40.6.

Although the government refers to visa decisions being made by consular officers at "far-off" or "distant" posts (Br. 15, 39), that is not entirely accurate. The Attorney General, the Secretary of Homeland Security, and the Secretary of State each may be involved in directing the refusal of visas or making inadmissibility determinations. See 6 U.S.C. § 236(a)-(c); 8 U.S.C. §§ 1104(a)(1), 1182(a)(3)(B)(i)(II). In the context of security issues, refusals also may be based on database "hits" that the consular officer "should not look behind" or "re-adjudicate."[4] The Foreign Af-

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[4] *See, e.g.*, 9 F.A.M. § 40.6 nn.3.1, 3.2 (refusals based on DHS database entries). For the use of databases generally, *see* U.S. Dep't of State, *Consular Consolidated Database (CCD) Privacy Impact Statement* 8-12, 14-16 (Mar. 22, 2010), *available at* http://www.state.gov/documents/organization/93772.pdf. For information on DHS or "Washington-based" review over security-related visa issues, *see generally* U.S. Dep't of Homeland Sec., DHS/ICE/PIA-011(a), *Visa Security Program Tracking Sys-*

fairs Manual recognizes, however, that such entries may be erroneous and warrant reconsideration. 9 F.A.M. § 40.6 nn.3.2(3), 3.3. Government audits have likewise revealed substantial error rates in such databases.[5]

3. The numerous terrorism-related grounds for refusing a visa are in 8 U.S.C. § 1182(a)(3)(B). To avoid ensnaring the innocent, Congress has provided the opportunity to rebut an exclusion based on several provisions involving a connection to or support for certain terrorist organizations, by presenting "clear and convincing evidence that [the alien] did not know, and should not have reasonably known, that

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tem-Network version 2.0, at 3 (Jan. 17, 2013), *available at* http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia-ice_vsptsnet202200_20130117.pdf; *Border Security Oversight, Part III: Border Crossing Cards and B1/B2 Visas: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 43 (2013) (statement of Edward J. Ramotowski, Deputy Assistant Sec'y for Visa Servs.).

[5] *See* U.S. Gov't Accountability Office, GAO-06-1031, *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public* (Sept. 2006), *available at* http://www.gao.gov/new.items/d061031.pdf (finding that "about half" of "tens of thousands of names" in FBI-managed Terrorist Watch List were misidentifications, indicating need for redress procedures); Office of the Inspector Gen. Audit Div., U.S. Dep't of Justice, Audit Report 07-41, *Follow-Up Audit of the Terrorist Screening Center* 28-39 (Sept. 2007), *available at* http://www.justice.gov/oig/reports/FBI/a0741/final.pdf (finding 38% error or inconsistency rate, notwithstanding quality assurance efforts). The FBI database at issue in these audits is one of the databases relied on by the consular officers' system. *See* Statement of Donna A. Bucella, Director, Terrorist Screening Ctr., Fed. Bureau of Investigation, Before the Subcomm. on Nat'l Security, Emerging Threats, and Int'l Relations (July 13, 2014), http://www.fbi.gov/news/testimony/mission-of-the-terrorist-screening-center-and-visa-revocation.

the organization was a terrorist organization." *Id.* § 1182(a)(3)(B)(i)(VI), (iv)(IV)(cc), (V)(cc), (VI)(dd); see 22 C.F.R. § 42.81(b) (recognizing that if a "ground of ineligibility may be overcome by the presentation of additional evidence," the applicant may "submit such evidence").

The statute generally requires a consular officer to provide the visa applicant with timely written notice that "states the determination" and "lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1). Congress permitted an exception if the alien was deemed inadmissible under the criminal or security-related provisions of Section 1182. *Id.* § 1182(b)(3). Nonetheless, the Department of State regulation generally requires that notice be given. 22 C.F.R. § 42.81(b) ("consular officer shall inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available"); 9 F.A.M. § 42.81 n.2.

Providing notice is important because when a visa is refused, applicants can seek to overcome the ground for refusal. See 22 C.F.R. § 42.81(e); 9 F.A.M. § 42.81 n.4.3, proc. note 1.1-1(a)(2). State Department annual reports, as cited by the government (Br. 31 n.10), show that it is common to "overcome" a finding of ineligibility by submitting evidence that the stated reason for ineligibility does not apply, or by obtaining a waiver or other relief.[6] This is another reason why a citizen-spouse's interest does not terminate after the

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[6] Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office 2013*, tbl.XX (2013) ("2013 Annual Report"), *available at* http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf.

I-130 is granted; even after a spouse's immigrant visa is denied, the citizen-spouse's continuing support is essential to any request for reconsideration or for an exemption, or to the submission of a subsequent visa application.[7]

II. FACTUAL AND PROCEDURAL HISTORY

A. Din's Visa Petition On Behalf Of Her Husband

Fauzia Din was born in Afghanistan. J.A. 27. She fled the country in 1998 with her mother and sister, entered the United States as a refugee in 2000, and became a naturalized citizen in 2007. *Id.*

In September 2006, Din returned to Afghanistan to marry an Afghan native whom she and her family had known for years, and who resides in Afghanistan. J.A. 28.

In October 2006, Din filed a Form I-130 petition documenting her marriage. J.A. 28. On February 12, 2008, USCIS notified Din that her petition had been approved and sent to the Department of State National Visa Center for further processing. *Id.* On July 29, 2008, the National Visa Center notified Din that an immigrant visa interview for her husband was scheduled at the Embassy in Islamabad, Pakistan. *Id.*

B. Delay And Denial Of The Visa

The visa interview took place in Islamabad on September 9, 2008. J.A. 29. Respondent's husband an-

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[7] Counsel's ongoing factual investigation has revealed substantial evidence that supports respondent's husband's eligibility for admission and that was not included in the original *pro se* visa application. A renewed application setting forth this evidence will be submitted in the coming weeks.

swered all of the consular officer's questions truthfully and accurately. *Id.* At the conclusion, the consular officer handed him a Form 194 letter, which stated that, upon his return to Kabul, he was to bring his passport to the Embassy in Kabul, which would send his passport back to the Islamabad Embassy, which in turn "'will issue the visa and return [the passport] to the [Kabul Embassy].'" *Id.* The consular officer told him to expect to receive his visa in two to six weeks. *Id.*

Three months elapsed with no word, despite numerous requests for information. J.A. 29-30. In response to an email on January 28, 2009, respondent's husband was advised by the Immigration Visa Unit of the Embassy that "'the case is still pending under administrative process.'" J.A. 30. Respondent and her husband made inquiries again between February and June, 2009, but received no additional information. *Id.*

In early June 2009, Pete Stark, then the U.S. Representative from respondent's district, inquired on respondent's behalf about the status of the visa application. J.A. 30-31. On June 7, 2009, respondent's husband received a Form 194 letter stating the visa application had been denied under section 212(a) of the INA [8 U.S.C. § 1182(a)], and there was "'no possibility of a waiver of this ineligibility.'" J.A. 30.

On July 11, 2009, respondent's husband asked the Islamabad Embassy to explain why the visa application was denied. J.A. 31. On July 13, 2009, the Embassy responded, stating that the application was denied under 8 U.S.C. § 1182(a)(3)(B). *Id.* The email stated that "'[i]t is not possible to provide a detailed explanation of the reasons for the refusal,'" citing 8 U.S.C. § 1182(b)(2), (3). *Id.* Subsequent and repeated inquiries, including by Representative Stark and re-

spondent's pro bono counsel, went unanswered. J.A. 32-35. On January 4, 2010, USCIS sent Din a Form I-797 "Notification of Action" indicating that USCIS had received her visa petition back from the State Department, signaling the finality of denial. J.A. 36.

C. Course Of Proceedings

1. On February 5, 2010, respondent filed a complaint in the United States District Court for the Northern District of California seeking to compel defendants to adjudicate her husband's visa application "in a manner prescribed by law and not on the basis of any illegitimate or bad faith reasons." J.A. 40. Respondent's complaint alleged that there is no "facially legitimate and bona fide reason" for the denial of her husband's visa application "under 8 U.S.C. § 1182(a)(3)(B)," and that in the absence of such a reason, the visa denial violated her liberty interest in her marriage. J.A. 36-37.

2. The government filed a motion to dismiss, which was granted on June 22, 2010. Pet. App. 37a, 43a, 49a. The court agreed with Din that the denial of her husband's visa implicated her right to marriage, and entitled her "'to a limited judicial inquiry regarding the reason for the decision.'" *Id.* at 44a. Although the government had not identified which of the "numerous grounds for inadmissibility" under Section 1182(a)(3) applied, the court held that a "reference to Section 1182(a)(3) is sufficient to be facially legitimate." *Id.* at 44a-45a.

3. On appeal, the Court of Appeals for the Ninth Circuit, in a 2-1 ruling, reversed and remanded the case. Both the panel majority and the dissent agreed that Din was entitled to limited judicial review of the visa denial under the standard this Court set forth in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), because

the denial implicated her "right to [f]reedom of personal choice in matters of marriage and family life." Pet. App. 6a-7a & n.1 (quotations omitted; alteration in original) (panel majority); *id.* at 26a (Clifton, J., dissenting). In reviewing to determine whether a facially legitimate and bona fide reason supported the government's action, the majority stated, "[t]o be clear, we do not 'look behind' exclusion decisions, but we must at least look at them," *id.* at 13a (citation and quotations omitted), and it discussed the limited review courts had provided in the few cases where the issue has arisen. *Id.* at 8a-14a & n.2.

The majority and dissent differed on whether the government's bare citation to Section 1182(a)(3)(B) met the *Mandel* standard. The dissent thought that merely identifying a statute that authorized exclusion was sufficient. Pet. App. 27a-29a.

The panel majority disagreed. Pet. App. at 9a. Without "factual allegations that would allow [the court] to determine if the specific subsection of § 1182(a)(3)(B) was properly applied," the court could not provide review comparable to what other courts had done, and would have no basis on which to find that the denial was even facially legitimate, let alone bona fide. *Id.* Although the majority emphasized that the government "need not prove" that respondent's husband engaged in conduct that rendered him inadmissible under the statute, it "must at least allege" what it "believes" he did "that would render him inadmissible." *Id.* at 14a (citation omitted). Without such an allegation, "[a]ny judicial review would be wholly perfunctory," and "it cannot be that Din's constitutional right to review is a right only to a rubberstamp on the Government's vague and conclusory assertion of inadmissibility." *Id.*

The majority also rejected the argument that Section 1182(b)(3) meant the government "was not required to provide more specific information" about the visa denial. Pet. App. 17a (quotations omitted). Section 1182(b)(3) addressed only the requirement of providing notice to aliens, not the rights of U.S. citizens. *Id.* at 18a. Allowing the government to withhold the reasons for its action in a constitutional challenge brought by a citizen "is inconsistent with any concept of judicial review." *Id.* at 19a.

Finally, the majority emphasized that although the government had "never asserted" that significant national security issues were at stake in this particular case, nothing in its opinion compels the government to make "dangerous disclosure[s]." Pet. App. 20a. If necessary, the government may disclose the reason for the visa denial *in camera*, as in suits challenging the withholding of information under the Freedom of Information Act (FOIA). *Id.* at 21a. The majority concluded that "[e]xisting procedures are adequate to address the national security concerns we share with the dissent, and make it unnecessary to eliminate all judicial review and disclosure." *Id.* The court remanded the case to the district court for further proceedings. *Id.* at 25a. The government's petition for rehearing en banc was denied.

SUMMARY OF ARGUMENT

The right to marry is one of the historic liberties protected by the Due Process Clause. This Court long ago explained that marriage is the most important interpersonal relationship one can form, and the foundation of the family and our society. *Maynard* v. *Hill*, 125 U.S. 190, 205, 210-11 (1888). Marriage can fulfill this vital role only if spouses are at liberty to live together. That liberty is directly implicated here.

In recognizing that the right to live with one's spouse is a vital component of the right to marry, this Court will break no new ground. The right to live with one's spouse is integral to the marital rights that this Court already has recognized as fundamental. The right to marry includes the right to be free from arbitrary governmental restraints in choosing whom to marry, *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967), in obtaining counseling and prescriptions for contraception, *Griswold* v. *Connecticut*, 381 U.S. 479, 483, 485-87 (1965), and in directing the upbringing of children, *Meyer* v. *Nebraska*, 262 U.S. 390, 399-401 (1923). Each of these rights would be severely compromised if the government arbitrarily could prevent spouses from living together. The protection afforded to marital privacy is expressly grounded, in significant part, on the right to associate with one's spouse. *Griswold*, 381 U.S. at 485-87. Marital association is constrained when one cannot live with one's spouse.

It is no sufficient answer for the government to assert that respondent may live with her spouse by leaving this country and moving abroad. The ability to flee from a jurisdiction that violates a fundamental right does not negate the violation. It is frequently the case that a right arbitrarily constrained in one jurisdiction may be exercised without constraint in another. *E.g.*, *Loving*, 388 U.S. at 6 n.5; *Zablocki* v. *Redhail*, 434 U.S. 374, 382 & n.9 (1978). Yet this Court has never excused an unconstitutional restraint in one jurisdiction when the affected individual could move elsewhere; such a principle is intolerable, as it would allow violations of due process to flourish so long as one haven of liberty remained.

The government also errs in claiming that respondent's injury is indirect. A restraint that divides spouses directly deprives each spouse of the other's

companionship and comfort. Din's injury is all the more direct and intolerable because of the dilemma she faces: either to abandon her mother, her sister, and her country to live with her husband, or to forsake her spouse to stay here with her family. Din is thus directly and acutely affected by the unexplained denial of her husband's visa application, the effects of which are "slicing deeply into the family itself." *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 498 (1977) (plurality opinion).

The fundamental rights of U.S. citizens do not disappear in the context of immigration. The context in which a restraint of liberty arises affects the nature of the process that is due; it does not provide a basis for denying the existence of the restraint itself. In the prison context, the government routinely imposes severe constraints on liberty, but the Constitution continues to protect prisoners against arbitrary deprivations of liberty, *Superintendent* v. *Hill*, 472 U.S. 445, 454 (1985), including of the right to marry, *Turner* v. *Safley*, 482 U.S. 78, 84, 95-96 (1987). The same is true in the immigration context. Although this Court has held that aliens seeking their first admission to this country are not "persons" for purposes of the Due Process Clause, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), those who are "persons" (citizens and residents) are protected against arbitrary immigration-related deprivations of their liberty. *E.g.*, *Landon* v. *Plasencia*, 459 U.S. 21 (1982); *Yamataya* v. *Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903). Citizens may challenge laws and decisions that deny an alien admission even when the alien himself lacks standing to do so. *Fiallo* v. *Bell*, 430 U.S. 787 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753.

Under these settled principles, due process requires that the government provide notice of the basis for an action that invades a citizen's liberty and an opportunity for judicial review. The irreducible minimum of due process is protection against arbitrary government action. *Wilkinson* v. *Austin*, 545 U.S. 209, 226 (2005); *The Japanese Immigrant Case*, 189 U.S. at 100-01. A government that is allowed to act without explanation is free to act arbitrarily; it can act for any reason, or for no reason at all, heedless of the constraints that the legislature has imposed or that the facts may dictate. Congress has nowhere barred judicial review of respondent's claim, and should not be understood to have done so implicitly. *Webster* v. *Doe*, 486 U.S. 592, 603 (1988).

The minimum process that is due in the immigration context, where the Executive purports to apply statutory criteria, is judicial review to determine whether "some evidence" supports the government's action. *United States ex rel. Vajtauer* v. *Comm'r of Immigration*, 273 U.S. 103, 106 (1927). This highly deferential standard is functionally equivalent to the review this Court has given to Congress's and the Attorney General's exercise of discretion in the immigration context, which assesses whether a facially legitimate and bona fide reason supports the legislative or executive judgment. *Fiallo*, 430 U.S. at 790-91 & n.3, 793-95 & nn.5, 6; *Mandel*, 408 U.S. at 765. The Ninth Circuit faithfully followed this Court's lead in remanding for deferential review under the *Mandel* standard, and that judgment should be affirmed.

On remand, the government's national security concerns, if asserted, will warrant the lower courts' keen attention; such concerns, however, do not allow the courts to close the courthouse doors to the constitutional claims of citizens. *Hamdi* v. *Rumsfeld*, 542

U.S. 507, 537 (2004) (plurality opinion). This Court has declined prior requests to create a national security exception for violations of constitutional rights. It should decline to do so again here, where the government acknowledges (Br. 52) that "some refusals" to grant visa applications under Section 1182(a)(2) and (a)(3) do not involve sensitive criminal or national security information, and where courts are fully capable of addressing with appropriate procedural safeguards any refusals that involve such information.

ARGUMENT

I. THE DENIAL OF A VISA TO THE SPOUSE OF A U.S. CITIZEN IMPLICATES THE CITIZEN'S FUNDAMENTAL RIGHT IN MARRIAGE AND PROVIDES A BASIS FOR JUDICIAL REVIEW.

A. The Fundamental Right To Marry Includes The Right To Live With One's Spouse.

This Court has emphatically held that liberty in marriage is a fundamental right protected from arbitrary governmental restriction. In *Loving*, the Court observed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. The Court explained that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* (quoting *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942)). "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384; see also

id. (citing, *e.g.*, *Maynard* v. *Hill*, 125 U.S. 190 (1888)); *Loving*, 388 U.S. at 12 (same).

The government concedes that Din has "a deeply rooted liberty interest, protected by the Due Process Clause, in 'rights to marital privacy and to marry and raise a family.'" Br. 22. But in the government's view, these rights "are not implicated here" because the visa denial did not "nullify the marriage," deprive her of the "legal benefits" it created, or prevent her from leaving the United States to live abroad with her spouse. *Id.* at 22-23. The government asserts this cramped view of the right to marry only by ignoring both the associational interests in marriage that necessarily are protected by the right to marry, and the "legal benefit" the Due Process Clause provides against the arbitrary deprivation of those interests.

1. More than 120 years ago, this Court held in *Maynard*, 125 U.S. at 210-11, that marriage is "something more than a mere contract"; marriage instead is "the most important relation in life," *id.* at 205, and "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.* at 211. Marriage could not be the "most important relation in life" and the "foundation of the family" unless marital partners have the right to live together.

Although *Maynard* relied upon the unique importance of marriage to allow Congress to legislate in the area of marital relations, subsequent decisions establish that the marital relationship is protected from arbitrary government restriction. In *Meyer* v. *Nebraska*, 262 U.S. 390, the Court held "[w]ithout doubt" that the term "liberty" includes "not merely freedom from bodily restraint but also the right of the individual to marry, establish a home and bring up children." *Id.* at 399. These privileges, the Court

observed, are "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* The Court thus struck down, as an arbitrary restraint of liberty, a statute that interfered with the right of a married couple to choose whether their child would be instructed in a foreign language. *Id.* at 400-01. Two years later the Court followed "the doctrine of *Meyer*" and held that a state law compelling attendance at a public school "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). In each case, the right of parents to establish a home and direct their children's upbringing presupposes their underlying and basic freedom to choose to live together in doing so.

This Court then "reaffirm[ed] the principle of the *Pierce* and *Meyer* cases" and the constitutional protection for the associational aspects of marriage in *Griswold* v. *Connecticut*, 381 U.S. at 483. The "marriage relationship," the Court held, lies within a "zone of privacy" that the Constitution protects from arbitrary government intrusion. *Id.* at 485-86. For this reason, the Court held unconstitutional a state law that invaded "the sacred precincts of marital bedrooms" and interfered with the rights of "*married persons*" to receive medical advice and prescriptions for contraception. *Id.* at 480, 485-86 (emphasis in original). The Court grounded this holding expressly in the associational aspect of marriage, stating that marriage "is an association that promotes a way of life," and "is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486.

A married couple who cannot choose to live together cannot enjoy the associational rights of marriage that this Court protected in *Griswold*. Such a couple

would have no liberty to determine whether and when to conceive a child, or whether to raise the child in a home with both parents, for "the sacred precincts" of a marital home would not be theirs to share. Absent the liberty to choose to live together, a married couple would be deprived of the freedom to develop the profound personal ties that make marriage the most important relationship in a person's life. The right of marital privacy thus presupposes an underlying right of association with one's spouse; that is precisely how this Court grounded the right in *Griswold*, and it is that very associational right that the government has arbitrarily invaded here.

That the right to marriage includes the associational right of a husband and wife to live together without arbitrary governmental restriction is confirmed by *Moore* v. *City of East Cleveland*, 431 U.S. 494. Relying on a "host of cases, tracing their lineage to *Meyer* and *Pierce*," and including *Loving* and *Griswold*, the Court in *Moore* struck down an "arbitrary boundary" that prevented a family from choosing to live together. *Id.* at 499, 500-03. *Moore* is based on this Court's decisions "establish[ing] that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503; see also id. at 499 (emphasizing need for careful examination "when the government intrudes on choices concerning family living arrangements").

Thus, the liberty interest that Din asserts here – to be free of arbitrary governmental restrictions on her ability to live with her spouse – is "[a]mong the historic liberties protected by the Due Process Clause," *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), and supported by "[o]ur Nation's history, legal traditions, and practices," *Washington* v. *Glucksberg*,

521 U.S. 702, 721 (1997). While it is true, as the government observes, that this Court is cautious when called upon to identify the aspects of liberty that the Constitution protects from arbitrary deprivation, *e.g. id.*; *Reno* v. *Flores*, 507 U.S. 292, 303 (1993), no new ground needs to be broken here. The right to live with one's spouse is an established and fundamental constitutional right. The government may not act arbitrarily to deny couples the right to live together any more than it may act arbitrarily to deny them access to contraception or to dictate how they raise their families.

2. The government claims that no such liberty interest in marriage arises "in an immigration context," Br. 28, because there is no recognized right "in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the alien from entering," Br. 25. That argument misconceives the nature of a fundamental right.

The context in which a deprivation arises affects the process that is due; it does not negate the very existence of the constitutional right itself. In the prison context, the deprivation of liberty interests (including in marriage) is pervasive, and incarceration following a conviction legitimately infringes the right to marry. Yet an *arbitrary* restriction on even a prisoner's right to marry is intolerable. See *Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *id.* at 95-99 (unanimously recognizing that prisoners retain the right to be free from arbitrary restraints on their rights to marry). Thus, "the right to marry is of fundamental importance for all individuals," *Zablocki*, 434 U.S. at 384, and so even if the government has valid grounds for restricting that

liberty, *see id.* at 392 (the government "may legitimately say that no one can marry who has a living husband or wife") (Stewart, J., concurring in the judgment), the government may not arbitrarily restrict an individual's right to marry absent any evidence that a valid restriction applies.

This Court's immigration decisions therefore distinguish, as separate issues, the questions of (i) whether an individual has a constitutionally protected liberty interest and, if so, (ii) what process is due. When government action implicates an individual's constitutional rights in the immigration context, the Court has protected those rights under a standard that is deferential to Congress and the Executive.

Mandel illustrates the point. There, the Court recognized that visa determinations can implicate the First Amendment rights of U.S. citizens, and for that reason warrant judicial review even where the alien himself is entitled to no review. 408 U.S. at 762-65. The Court acknowledged "that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country." *Id.* at 762. But that did not negate the constitutional rights of the U.S. citizens who wanted to meet with him. The Court did not merely assume *arguendo*, as the government now claims (Br. 38), that First Amendment rights were implicated. Rather, the Court rejected the government's argument that excluding Mandel did not "involve[]" any restriction on citizens' constitutional rights "at all." *Id.* at 764. The Court also rejected the government's argument that the First Amendment was "inapplicable" because the citizens had "free access to Mandel's ideas through his books and speeches tapes or telephone hook-ups." *Id.* at 765. These alternative ways of receiving Mandel's ideas, the Court held, do *not* "extinguish[] altogether

any constitutional interest on the part of the appellees in this particular form of access," *id* at 765, which was "to hear, speak, and debate with Mandel in person" in the United States. *Id.* at 762.

The First Amendment value vindicated in *Mandel* was essentially a right of association. Barring law professors from associating in person with Mandel, this Court held, implicated the professors' First Amendment rights because it deprived them of the opportunity to engage in "sustained, face-to-face debate, discussion and questioning." *Id.* at 765. The right to live with a spouse is similarly grounded in associational rights, as the Court in *Griswold* drew in part on First Amendment decisions involving "the right of association." 381 U.S. at 483-84. Thus when a visa implicates a citizen's right to marry and live with her spouse, the citizen should have the same right to judicial review that is available when the denial of a visa implicates a citizen's right to exchange ideas face-to-face.

This Court has already held, in *Fiallo* v. *Bell*, 430 U.S. 787, that the liberty interest in family reunification gives U.S. citizens a basis for challenging the constitutionality of the statute under which their fathers or children were denied visas. In *Fiallo*, the Court *rejected* the government's contention that a constitutional challenge by U.S. citizens to the denial of visas to their family members was "'not an appropriate subject for judicial review.'" *Id.* at 793 n.5. The Court held instead "that the families of putative immigrants certainly have an interest in their admission." *Id.* at 795 n.6. The Court explained that its "cases reflect acceptance of a limited judicial responsibility under the Constitution *even with respect to the power of Congress* to regulate the admission and exclusion of aliens." *Id.* at 793 n.5 (emphasis added);

see also *id.* at 795 n.6 (Congress's broad authority over immigration does not mean that "the Government's power in this area is never subject to judicial review"). Although the Court rejected the citizens' claims, it did so on the merits, because it found a facially legitimate and bona fide reason for denying the visas. *Id.* at 795 & n.6, 799.

The government claims that *Fiallo* "does not suggest the existence of a constitutionally protected liberty interest in marriage that extends to *having one's alien spouse admitted* to the United States." Br. 27 (emphasis added). But *Fiallo* squarely supports the existence of a liberty interest in being reunited with certain blood relatives; the Court's holding is that Congress had a facially legitimate and bona fide reason, under *Mandel*, for not providing an immigration preference to those relatives. Applying *Fiallo* here, the Court should find that respondent has a protected liberty interest in living with her spouse, and should direct the district court on remand to review the government's restriction of that interest under *Mandel* or the similarly deferential "some evidence" standard discussed in Part II, *infra*.

The government's reliance on *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, is also misplaced. The petitioner in *Knauff* was an alien denied entry, not her U.S. spouse, and so the Court did not address the liberty interest of a U.S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse.[8] *Knauff*

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[8] As explained further in Part II.A *infra*, *Knauff* reflects the principle that aliens outside the United States are not "persons" protected by the Constitution at all, and thus are unlike citizens or residents who are persons entitled to due process in the immigration context.

also differs materially from this case because, as the government's brief in *Knauff* explained, the Attorney General already had provided a written summary of the factual basis on which Knauff's visa was denied,[9] which referenced a facially legitimate and bona fide reason for the visa denial in *Knauff* that is absent here.

The decisions of the courts of appeals that the government cites (Br. 26 n.9) also fail to address the issue presented here. Each rejects a different and far broader right than Din has claimed, one to have a spouse reside in the United States notwithstanding the government's stated, facially legitimate, and bona fide reason for exclusion or removal.[10] The govern-

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[9] *See* Br. for the Respondent at 5-6, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (filed Oct. 4 1949) (No. 54) (quoting Attorney General's written explanation to Knauff's representative that the FBI believed Knauff would be "a hazard to internal security" because she "was formerly a paid agent of the Czechoslovakian Government, and reported on American personnel assigned to the Civil Censorship Division in Germany"). Knauff claimed that, if given an evidentiary hearing, she could disprove these allegations, which she eventually did. *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting).

[10] *See Bangura* v. *Hansen*, 434 F.3d 487, 495-96 (6th Cir. 2006) (the "'Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country'" when the spouse previously and fraudulently attempted to immigrate via marriage); *Burrafato* v. *U.S. Dept' of State*, 523 F.2d 554, 555, 556 & nn.2, 3 (2d Cir. 1975) (holding that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse" where spouse had entered America illegally, been denied a visa due to organized crime activity, and did not challenge the consular officer's visa denial); *Oforji* v. *Ashcroft*, 354 F.3d 609, 617-18 (7th Cir. 2003) (rejecting argument that the "potential hardship to citizen children arising from the mother's deportation should allow an otherwise unqualified

ment cites no case in which any court has held that the government is free to restrict the liberty of a U.S. citizen without providing a facially legitimate and bona fide reason for that deprivation.

B. Din's Right To Marry Is Directly Implicated By The Denial Of Her Spouse's Visa.

Respondent is directly affected by the denial of her husband's visa application. The government's refusal to approve her husband's visa means she must choose either to live without her husband in the United States, thereby forgoing the advantages of companionship and intimacy that distinguish marriage as the most important relationship a person may have, or to forsake her country and all of the freedom, security, and benefits that entails, including her established ties with her community, her mother, and her sister. The impact on respondent's freedom to marry is immediate and profound.

1. The government nonetheless argues that it is not invading any protected liberty interest because Din retains the ability to live with her husband abroad. Br. 22-23. This argument proves too much.

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mother to append to the children's right to remain in the United States"); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982) (affirming denial of writ of habeas corpus to set aside a final order of deportation because, among other grounds, "Mrs. Garcia and the children cannot use their citizenship to prevent the deportation of Mr. Garcia"); *Swartz* v. *Rogers*, 254 F.2d 338, 338-39 (D.C. Cir. 1958) (where resident alien has violated the Narcotics Act, spouse's right to marriage is not "so protected by the due process clause" as to bar her husband's deportation); *Payne-Barahona* v. *Gonzáles* , 474 F.3d. 1, 2-3 (1st Cir. 2007) (where resident-parent committed crime that "was indisputedly an aggravated felony" supporting removal and denial of relief from removal, "a parent's otherwise valid deportation does not violate a child's constitutional right").

To accept it would be to allow the government to infringe liberty interests arbitrarily so long as there are some circumstances in which the right may still be exercised. That a deprivation of liberty is less severe than a total deprivation does not negate the fact that it is a deprivation. The Court's marriage and family rights decisions presuppose this principle.

In *Loving*, for example, this Court held that state laws "restricting the freedom to marry solely because of racial classifications" violated not only the equal protection clause, but that they "also deprive[d] the Lovings of liberty without due process of law." 388 U.S. at 12. With respect to due process, the Court explained that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* The freedom to marry necessarily includes the freedom to choose to reside in Virginia, because it was apparent to the Court that the Lovings could have avoided Virginia's restrictions by moving to another state. The Court observed that apart from Virginia, only "15 other States" had statutes that barred interracial marriage, and that "Maryland" had "repealed its prohibitions," *id.* at 6 n.5. It was thus obvious that the Lovings could have moved elsewhere, including to a neighboring state, and been at liberty to marry, yet it is inconceivable that the Court would have found this argument a persuasive reason to let Virginia's statutes stand.

The Court has considered the impact of other jurisdictions' practices on marital and family rights in at least two other cases. In *Zablocki* v. *Redhail*, 434 U.S. 374, the Court affirmed the judgment of a three-judge court invalidating a Wisconsin statute that barred a resident from marrying if he was out of compliance

with child-support duties.[11] Before this Court issued its decision, appellee Redhail "was married in Illinois." *Id.* at 382 n.9. This development did not moot the case, however, in part because appellee resided and evidently wished to remain in Wisconsin. *Id.* If the right to marry did not encompass the right to choose to reside within the jurisdiction whose restriction is challenged, then Redhail's individual claim would have been moot, because his marriage would have conclusively demonstrated that he had fully vindicated his marital rights in an adjacent jurisdiction. Redhail's right to marry necessarily encompassed his right to choose to live in Wisconsin free of arbitrary marital restrictions rather than in Illinois.

In *Moore* v. *City of East Cleveland*, Justice White pointed out, in dissent, that East Cleveland's ordinance ought to be upheld because petitioner would have been "free" to exercise her rights "in other parts of the Cleveland metropolitan area." 431 U.S. at 550 (White, J. dissenting). The Court nonetheless refused to excuse East Cleveland's arbitrary separation of family members. *Loving*, *Zablocki*, and *Moore* each illustrate how, on the government's theory, any manner of discrimination would become permissible if the victim can be told to move elsewhere.

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[11] Although the Court affirmed on the equal protection grounds raised below, the Court's reasoning relied heavily on the Due Process Clause. The Court observed that the right to marry was "a fundamental liberty protected by the Due Process Clause," and took pains to draw attention to and quote the separate holding in *Loving* v. *Virginia* that rests upon the due process clause, as well as to discuss the fundamental nature of the right to marry as set forth in *Maynard*, *Meyer*, *Griswold*, and other cases. *Zablocki*, 434 U.S. at 383-86.

Accepting the government's "you are free to move outside the country" argument would place an even greater burden on Din than it would have on the citizens in *Loving*, *Zablocki*, and *Moore*, because she is being asked to forsake not just her city or state but her country. This Court has repeatedly recognized the extreme imposition on a person's liberty interests that government-compelled exile imposes, with Justice Brandeis describing it as potentially imposing a "loss of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); see also *Landon*, 459 U.S. at 34; *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945). The government's argument also ignores respondent's interest in remaining near her ailing mother and her sister, who entered the United States as refugees with Din and who reside here. J.A. 27. To construe the Due Process Clause as narrowly as the government does is to permit the government arbitrarily to "slic[e] deeply into the family itself." *Moore*, 431 U.S. at 498.

2. The government also argues that the "United States has taken no adverse action against respondent herself," so her only injury is "'indirect and incidental' harm" from the denial of her husband's visa. Br. 30-31 (citing *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980)). To acknowledge an infringement of respondent's interest, the government warns, would open the floodgates to all manner of claims. *Id.* at 31-32. Neither of these concerns has merit.

a. The government's argument based on *O'Bannon* is irreconcilable with *Mandel* and *Fiallo*. Each recognizes that the denial of a visa may implicate the rights of U.S. citizens who therefore may bring suit in federal court to challenge that infringement, even if the scope of review is narrow. See pages

20-22, *supra*; *Mandel*, 408 U.S. at 762-65; *Fiallo*, 430 U.S. at 790-91 & n.3, 793-95 & nn.5, 6. *O'Bannon*, in contrast, did not involve a citizen's constitutional challenge to the denial of a visa. It involved a due process claim by Medicaid beneficiaries who alleged that the government's termination of the Medicaid provider agreement with their nursing home infringed their alleged right to live in that particular home. *O'Bannon*, 447 U.S. at 775-76. This Court found no such liberty interest. The Court instead held that the Medicaid statute gave recipients only "the right to choose among a range of *qualified* providers," but not a right "to continue to receive benefits for care in a home that has been decertified." *Id.* at 785 (emphasis in original). Thus, even though the decertification of the nursing home may have had an adverse effect on the residents, the residents had no due process claim because the decertification did not directly affect their liberty or property rights. *Id.* at 788.

Here, in contrast, the denial of the visa directly affected a recognized liberty interest arising from the Due Process Clause, namely Din's liberty interest in her marriage. Where one spouse has raised a claim that the right to marriage was infringed, this Court has vindicated marriage rights based on the standard of review appropriate for that spouse's claim. See *Turner*, 482 U.S. at 82, 96-97, 99.

The government also contends that any liberty interest respondent may have had was extinguished, under the "two-step" statutory scheme, upon the granting of her I-130 petition. Br. 14. This myopic argument overlooks that Din has a constitutionally protected liberty interest in her marriage that, in this context, turns ultimately on the resolution of the visa petition. It also overlooks the intended and exclusive

purpose of giving citizen-spouses the ability to file I-130 applications, which is to promote family unification by allowing the alien to immigrate, absent a bar on admissibility. See pages 2-4, *supra*. And it further overlooks the meaningful role a citizen-spouse continues to play in the statutory process, which includes the power to terminate her spouse's visa application even after the grant of an I-130 petition, as well as to supplement a spouse's visa application and support a request for reconsideration, waiver, exemption, or a renewed application. See pages 3-4, 6-7, *supra*.

b. For this Court to acknowledge that the denial of a spousal visa can implicate a citizen's liberty interest in marriage would not "work a sea change in the law, creating obstacles to the government's exercise of its plenary power over the Nation's borders and burdening the courts," as the government claims (Br. 31).

To begin with, the decision will not enlarge the rights of citizens outside the visa admission process, such as in connection with removal proceedings, because aliens within this country's borders are themselves afforded due process. Through the exercise of their own rights, they receive process at least equivalent to, if not greater than, *Mandel* review. The statutory criteria for ordering removal on terrorism-related grounds are the same as those for denying admission, and the government must provide procedural protection to individuals facing removal, including written notice of the statutory and factual grounds for removal and a hearing before an administrative law judge. See 8 U.S.C. §§ 1229(a)(1), 1229a. It therefore would be pointless for a spouse to file suit challenging removal on *Mandel* grounds, because the government already provides a facially legitimate and

bona fide reason for removal. The same is true for persons "convicted of a crime." Br. 35.[12]

Even within the context of visa denials, recognizing a spouse's liberty interest would not open the floodgates to lawsuits. First, the spousal liberty interest here arises from the deeply rooted right to marry and establish a family. This liberty interest, and the resulting right to *Mandel* review, corresponds, and may be limited to, those who, under the INA, may sponsor a spouse, minor child, or parent for admission regardless of quotas. See page 3, *supra*.

Second, the government overstates the volume of implicated visa denials and ignores the narrow scope of review at issue. The government asserts that over 1200 spousal visas were denied on Section 1182(a)(2) or (a)(3) grounds in 2013. Br. 31 n.10. That statistic vastly overstates the pertinent denials, which are only those for which the petitioning citizen receives *no facially legitimate and bona fide explanation*. The Annual Report shows that the overwhelming majority of Section 1182(a) denials involve grounds for which the aliens must receive notice of the basis for exclusion, and that most Section 1182(a)(2) or (a)(3) denials are for criminal convictions or admitted criminal acts under Section 1182(a)(2)(A), (B), where the fac-

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[12] The government selectively quotes the Brief in Opposition to characterize respondent's position as that children "'certainly would have' a constitutional right to challenge a parent's imprisonment." Br. 32 (quoting Br. in Opp. 21 n.4). What respondent said was that children would "have such a right were a parent *summarily imprisoned without explanation*." Br. in Opp. 21 n.4. But if "the parent was first convicted pursuant to the procedures due process requires," the child would not have a valid claim under *Mandel* because the government "already would have provided far more than a facially legitimate and bona fide reason" supported by some evidence. *Id.*

tual basis for exclusion is known.[13] In these and other contexts where the denial is supported by a facially legitimate and bona fide reason for denying a visa, a spouse has no reason to seek review under *Mandel*.

The government thus errs in contending that respondent seeks a right to judicial review when a visa is denied "for any reason." Br. 31. Rather, it is in the limited circumstances where the government provides no reason, or where the reason on its face is illegitimate, that a citizen spouse will have cause to bring suit. In such cases, affording a citizen spouse limited judicial review is the only means to protect the citizen's liberty interest from arbitrary deprivation. As *Mandel* and *Fiallo* illustrate, and as explained further below, affording such review is an anchor of the Constitution's protection of individual liberty.

II. DUE PROCESS REQUIRES, AT A BARE MINIMUM, A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR INFRINGING A CONSTITUTIONALLY PROTECTED INTEREST.

"A liberty interest having been established," the question becomes, "what process is due"? *Wilkinson*, 545 U.S. at 224. "*Mandel* review" – in which courts determine whether a "facially legitimate and bona fide" reason supports an admissibility determination affecting the rights of a U.S. citizen – is the most deferential review consistent with due process. It allows

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[13] *See* 2013 Annual Report, *supra* note 6. The Table cited does not present the 1200 figure that the government cites, *see* Br. 31 n.10, or even identify the number of *applications* denied on 1182(a)(2) or (a)(3) grounds, but only the number of times each *ground for ineligibility* was cited, recognizing that a given application may be denied based on multiple grounds.

a court to determine whether Executive action accords with the law and is supported by "some evidence" or factual basis, without second-guessing the Executive's factual determinations. *Vajtauer*, 273 U.S. at 106. Such review appropriately accounts for and defers to the government's institutional interests while guarding against arbitrary action that, as here, is tearing apart a citizen's family life.

The government argues that "even if respondent did have a liberty interest that is implicated in this context," the Ninth Circuit "erred in concluding that she has a right to judicial review," based on, the doctrine of consular nonreviewability, the political branches' plenary power over immigration, and concerns for national security. Br. 15-16. This Court has never foreclosed all judicial review, however, once it has found that government action implicates a U.S. citizen's liberty interest. Instead, the Court has held that due process protects against the arbitrary restriction of that interest, and requires *some* process to ensure that there is *some* legitimate basis for the deprivation, even in the immigration context. To hold otherwise here would establish a radical and unprecedented principle that U.S. citizens may be subjected to arbitrary deprivations of their liberty without any process at all.

A. Due Process Protects Against The Arbitrary Deprivation Of Citizens' Rights, Even In The Immigration Context.

1. This Court has long and repeatedly recognized that due process "guards against arbitrary decisionmaking." *Wilkinson*, 545 U.S. at 226; see, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."). The power the government claims here – to infringe a cit-

izen's liberty interest without explanation – is inconsistent with the irreducible minimum of due process. A government that is allowed to act without explanation is free to act arbitrarily; it can act for any reason, or for no reason at all, heedless of the constraints imposed by statute, regulation, or evidentiary record.

The point is illustrated by *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951), where the Attorney General had designated several organizations as "'totalitarian, fascist, communist or subversive'" after a secret investigation and without giving any stated reason. *Id.* at 125. The organizations filed suit, claiming to be "engaged in charitable or civic activities" and to have "an attitude of cooperation and helpfulness, rather than one of hostility or disloyalty" toward the United States. *Id.* This Court held that the Attorney General lacked the authority to "act arbitrarily or capriciously" or "contrary to the uncontroverted material facts." *Id.* at 136 (plurality opinion). The plurality interpreted the relevant Executive Order as denying the Attorney General that authority to avoid the substantial constitutional questions that were raised (*id.*), but four justices said it would violate due process to give the Attorney General such unfettered discretion, see *id.* at 143 (Black, J., concurring), *id.* at 173 (Frankfurter, J., concurring); *id.* at 176 (Douglas, J., concurring); *id.* at 186-87 (Jackson, J., concurring). As Justice Frankfurter explained, in an opinion to which this Court has repeatedly cited, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Id.* at 170.[14]

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[14] For decisions of this Court quoting Justice Frankfurter's concurrence, *see, e.g.*, *Connecticut* v. *Doehr*, 501 U.S. 1, 14 (1991); *Lankford* v. *Idaho*, 500 U.S. 110, 121 (1991); *Goss* v. *Lopez*, 419 U.S. 565, 579-80 (1975); *Fuentes* v. *Shevin*, 407 U.S.

Even when government power to restrict liberty is at its zenith, this Court has held that due process requires, at a minimum, a legitimate reason supported by "some evidence" to restrict an important liberty interest. *Superintendent* v. *Hill*, 472 U.S. at 455 (citing cases). *Hill* applied the "some evidence" standard in the prison context, *id.* at 447-48, and drew on prior cases that applied that same highly deferential standard in other contexts as well, including immigration, *id.* at 455. Thus, the Court in *Hill* cited, among other cases, *Vajtauer* v. *Comm'r of Immig.*, where the Court adopted a "some evidence" standard of review for deportation orders, because deportation "on charges unsupported by any evidence is a denial of due process." 273 U.S. at 106

Hill also drew on this Court's use of the "some evidence" standard in other contexts where the Constitution requires a highly deferential standard of review, such as in reviewing a state supreme court's decisions managing admissions to the state bar. In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246-47 (1957), the Court held it violated due process to deny a person the opportunity to take the bar exam when there was "no evidence in the record which rationally justifies a finding that [the person] was morally unfit to practice law." The Court explained: "Even in applying permissible standards, officers of a State" cannot infringe a liberty interest "when there is no basis for their finding." *Id.* at 239; see also, *e.g.*, *Douglas* v. *Buder*, 412 U.S. 430, 432 (1973) (per curiam) (revocation of parole for failing to report an "arrest" that was actually only a traffic citation was "was so totally devoid of evidentiary support as to be

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67, 81 (1972); *see also Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970).

invalid under the Due Process Clause"); *Thompson* v. *City of Louisville*, 362 U.S. 199, 204 (1960) (loitering citation violated due process where it was "entirely lacking in evidence").

2. The government nonetheless argues that providing any form of judicial review here would contravene the "doctrine of consular nonreviewability" and "the plenary power" of the political branches relating to aliens' qualification for admission to the United States. Br. 15, 33-38. For two reasons, these doctrines do not foreclose review of actions that implicate a U.S. citizen's constitutional rights.

First, where "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603. This "heightened showing" is required to avoid the "'serious constitutional question'" that would arise if a "federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quoting *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)); see also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) (noting use of constitutional-avoidance canon in immigration context); *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-99 (1991) (recognizing strong presumption in favor of judicial review of administrative action, even in the immigration context).

The Government cites no provision in the INA clearly barring citizens' constitutional claims. Below, the government admitted that "Congress never expressly addressed the issue of whether consular decisions are subject to judicial review," Appellee's Answering Br. 12, and it never disputed that Din could obtain limited judicial review *if* she could demonstrate a "cognizable constitutional interest in the visa denial." *Id.* at 1; see also *id* at 13-21, Pet'n for Re-

hearing En Banc 6-13. Similarly, the government conceded in *Mandel*: "Of course, we have never said courts cannot review action of the government that deprives citizens of rights under the First Amendment." Reply Br. at 9, *Kleindienst* v. *Mandel*, 408 U.S. 753 (filed Apr. 11, 1972) (No. 71-16). Against this backdrop, the government's current argument – that it may impose restrictions, without explanation or judicial review, even on a citizen who does "have a liberty interest" (Br. 15) – is radical and without support. To the contrary, the absence of any clear statement from Congress of its unmistakable intent to deny citizens judicial review for their constitutional claims warrants avoidance of the constitutional issue and the provision of judicial review. *Webster*, 486 U.S. at 603.

Second, this Court has long recognized a role for judicial review in the immigration context, including exclusion decisions, when constitutional rights are at issue. As the government itself acknowledges, the "doctrine of consular nonreviewability" – to which some lower courts refer – rests on the premise that "*aliens* outside the United States lack any constitutional rights." Br. 34-38 (emphasis added) (citing, among others, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Knauff* v. *Shaughnessy*, 338 U.S. at 544). It is for this reason that the only process "due" for such aliens is that which Congress requires. See *Zadvydas*, 533 U.S. at 693-94 (explaining that the individual in *Mezei* "was 'treated,' for constitutional purposes, 'as if stopped at the border,'" so *Mezei* is not precedent for denying due process to persons in the United States); *Landon*, 459 U.S. at 32 (explaining *Knauff* as reflecting principle that "an alien seeking initial admission has no constitutional rights regarding his application");

Rafeedie v. *INS*, 880 F.2d 506, 519-20 (D.C. Cir. 1989) (same).

The Court has never held, however, that Congress and the Executive are wholly immune from judicial review when the constitutional rights of a protected "person" are at issue. To the contrary, Congress's "'plenary power' to create immigration law" remains "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also id.* at 693; *Demore* v. *Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (explaining, in immigration context, that "the Due Process Clause prohibits arbitrary deprivations of liberty").

Over a century ago, the Court drew this distinction in *The Japanese Immigrant Case*, explaining that "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving *the liberty of persons*, may disregard the fundamental principles that inhere in 'due process of law.'" 189 U.S. at 100 (emphasis added). The Court thus held that a resident alien, having become subject to the country's jurisdiction and part of the population, cannot be deported without an "opportunity to be heard upon questions involving his right to be and remain in the United States," because "[n]o such arbitrary power can exist where the principles involved in the due process of law are recognized." *Id.* at 101.[15]

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[15] *Wong Wing* v. *United States*, 163 U.S. 228, 235-38 (1896), does not support the government's position because there the Court unanimously held that it violated the Fifth Amendment for Congress to impose a period of "imprisonment at hard labor" prior to the deportation of an alien whose right to residency had been revoked.

The due process rights of "persons" under the Fifth Amendment also are protected in the context of exclusion decisions. In *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), the Court held that, when a resident alien was subject to exclusion while attempting to return from abroad, he retained his status as a constitutionally protected person and thus was "entitled to due process" even if, for immigration purposes, "he is to be treated as an entrant alien." *Id.* at 600; *see also id.* at 596-98 & n.6 (citing *The Japanese Immigrant Case*); *id.* at 598-99, 601-02 (interpreting regulation to reflect no intent by Congress or Executive to deny due process). In *Landon*, the Court confirmed that resident aliens are "persons" with "ties" to this country, and that the right to "rejoin" one's "immediate family" is "a right that ranks high among the interests of the individual," and thus is entitled to due process protection even in the context of exclusion proceedings. 459 U.S. at 32-37. The Court also recognized that "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature," but there remains a "role for the judiciary," even if "limited," in safeguarding due process rights. *Id.* at 34-35.

The "some evidence" standard applied in *Vajtauer* arose in a context in which courts generally understood the relevant immigration law as not authorizing judicial review, "*except insofar as it was required by the Constitution.*" *INS* v. *St. Cyr*, 533 U.S. 289, 304 (2001) (emphasis in original) (quoting *Heikkila* v. *Barber*, 345 U.S. 229, 234-35 (1953), and discussing scope of review over deportation orders prior to 1952 INA). As part of this constitutionally mandated minimum level of review, the Court required that a deportation order be supported by "some evidence" and reviewed questions of law and statutory construction,

but otherwise did not review the Executive's factual determinations. *St. Cyr.*, 533 U.S. at 306-07 & n.27 (citing *Vajtauer*); see also, *e.g.*, *Kwock Jan Fat* v. *White*, 253 U.S. 454, 458 (1920) (reviewing in an exclusion case the determination of whether petitioner was a U.S. citizen to ensure that it comported with due process and had adequate support in the record).

Din is a U.S. citizen and thus a "person" protected by the Due Process Clause. As a citizen, she is entitled at least to a minimum level of due process to preclude the arbitrary deprivation of her liberty interest in living with her husband. The Court has reviewed comparable claims in *Fiallo*, 430 U.S. at 793 n.5, 795 n.6, and in *Mandel*, providing judicial review notwithstanding the political branches' broad power to regulate immigration and to conduct the nation's foreign policy. *Fiallo*, 430 U.S. at 792; *Mandel*, 408 U.S. at 766. This Court's "cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 793 n.5. There is no reason to depart from that precedent here.

B. Requiring A Facially Legitimate And Bona Fide Reason Provides The Constitutional Minimum Due Process Consistent With The Deference Owed The Executive Branch.

1. The deferential standard of review in *Mandel* is equivalent to the "some evidence" standard of review that this Court has long applied to Executive action in the immigration context and elsewhere. Declining to hold that the Executive could act "for any reason or no reason at all," *Mandel* looked only at whether there was a "facially legitimate and bona fide" explanation; the Court did not "look behind" the

reasons provided. *Mandel*, 408 U.S. at 769-70. That is "some evidence" review. *See Hamdi*, 542 U.S. at 527-28 (describing "some evidence" standard as a minimal standard of judicial review in which "the court would assume the accuracy of the Government's articulated basis and assess only whether that articulated basis was a legitimate one"); *Hill*, 472 U.S. at 455-56. Such review assesses whether the articulated factual basis – if assumed to be true – aligns with the statutory grounds for exclusion, properly construed. See *St. Cyr*, 533 U.S. at 304, 306-07; *Vajtauer*, 273 U.S. at 106.

Lower courts have effectively understood the "facially legitimate and bona fide" review standard in this way and have had no trouble applying it as such. Their inquiry has been directed not to proving or disproving the alleged conduct at issue but instead to determining whether the government has identified a "properly construed" statute providing a ground for exclusion, along with a factual basis for concluding that the consular officer "'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category." *Am. Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009) (citing 8 U.S.C. § 1201(g); 22 C.F.R. 40.6).

Such review has not led the lower courts to "second-guess" factual decisions. In *Adams* v. *Baker*, for example, the First Circuit found it sufficient that the government relied on public statements and news accounts of Gerry Adams' involvement with Sinn Fein, holding that consular officers are not limited to the kind of information that would be admissible at trial. 909 F.2d 643, 648-49 (1st Cir. 1990). Other cases applying *Mandel* are in accord. See, *e.g.*, *Bustamante* v. *Mukasey* , 531 F.3d. 1059, 1062-63 (9th Cir. 2008) (refusing to look behind government's declaration);

Marczak v. *Greene*, 971 F.2d 510, 517-18 (10th Cir. 1992) (applying *Mandel* review in context of alien parole to require the district director "to have articulated *some* individualized facially legitimate and bona fide reason for denying parole, and *some* factual basis for that decision," but rejecting any attempt to "reweigh the facts"); *El-Werfalli* v. *Smith*, 547 F. Supp. 152, 153-54 (S.D.N.Y. 1982) (finding government justification for refusing visa reasonably supported by submission of classified information).

Instead, the courts have performed their traditional role of construing the statute to ensure that the Executive is following Congress's demands. See *Abourezk* v. *Reagan*, 785 F.2d 1043, 1053-60 (D.C. Cir. 1986) (addressing issues of statutory construction in *Mandel* review), *aff'd on other grounds by an equally divided Court*, 484 U.S. 1 (1987); see also *id.* at 1063 n.1 (Bork, J., dissenting) (disagreeing with majority on the merits, but explaining: "Whether the majority is right or wrong on the statutory issue, there can be no question that appellants [U.S. citizens affected by the visa denials] have standing to raise it."); see also, *e.g.*, *Am. Acad.*, 573 F.3d at 127-28 (addressing issues of statutory construction); *Allende* v. *Shultz*, 845 F.2d 1111, 1116-21 (1st Cir. 1988) (same).

Courts thus have applied the "facially legitimate and bona fide" standard to require no more than the minimum that due process requires to guard against arbitrary action. Courts do not compel the issuance of a visa, but may issue declaratory relief and a writ directing adjudication consistent with the law. Cf. J.A. 40 (seeking a writ of mandamus and declaratory relief in Complaint's prayer for relief). This deferential standard protects against arbitrary government action without intruding needlessly upon the political

branch's authority over immigration, foreign policy, and national security.

2. The government advances two arguments besides plenary power for evading judicial review. First, the government argues that *Mandel* should be narrowly limited to situations where the Attorney General has explained why he declined a waiver, and not to a visa denial. Br. 39-41.

Such a limitation cannot be reconciled with the protection required by the Due Process Clause against the Executive's arbitrary restraint of liberty. Requiring a facially legitimate and bona fide basis, and hence "some evidence," for government action arises not simply from *Mandel*, but from the Due Process Clause itself, as reflected in numerous cases applying the Due Process Clause to protect the liberty of persons in the immigration context. See pages 36-39, *supra*. Such a limitation on *Mandel* also cannot be squared with *Fiallo*, where this Court applied the *Mandel* standard to review criteria for visa eligibility. *Fiallo*, 430 U.S. at 790. Every lower court faced with the issue has concluded, expressly or implicitly, that *Mandel* review applies to initial visa denials and not merely to subsequent waiver determinations. See *Am. Acad.*, 573 F.3d at 124; *Bustamante*, 531 F.3d at 1062 n.1; *Adams*, 909 F.2d at 647-50; *Allende*, 845 F.2d at 1114-21; *Abourezk*, 785 F.2d at 1050-51 & n.6.[16] It would be "counterintuitive to review a cabi-

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[16] The government cites (Br. 40), with a "cf." signal, *Saavedra Bruno* v. *Albright*, 197 F.3d 1153 (D.C. Cir. 1999). *Saavedra Bruno*, however, did not suggest that there is a material difference between a waiver decision and an initial visa determination. Rather, *Saavedra Bruno* rejected the claims before it on the grounds that the citizen-plaintiffs lacked any constitutional claims, and it distinguished *Abourezk* on that basis. *Id.* at 1163-65.

net officer's discretionary decision, but not a consular officer's decision as to statutory ineligibility." *Am. Acad.*, 573 F.3d at 125.[17] Both decisions must comport with due process. Neither may be arbitrary.

Second, the government argues that a citation to Section 1182(a)(3)(B) satisfies the Mandel standard. Br. 52-54. Accordingly to the government, "a consular officer's decision must, by definition, be tethered to the legal provisions that define the alien's eligibility," so "[i]t does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are 'facially legitimate.'" Br. 39. This argument ignores that the existence of a legitimate statutory criterion for exclusion does not ensure that Executive officers either have properly construed that criterion or have a proper factual basis to apply it in a given case.

In *Schware*, for example, it was facially legitimate to condition bar admission on good moral character; it violated the Due Process Clause, however, to invoke that criterion in the absence of any evidence of bad character. *Schware*, 353 U.S. at 246. The same was true in *Douglas*, 412 U.S. at 432, where parole legitimately could be revoked for failure to disclose an "arrest," but not where the record was bereft of any evidence of an arrest. See *Bridges*, 326 U.S. at 147-49, 156.

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[17] The government also argues that the decisions of consular officers are different than those of the Attorney General because consular officers serve at a "far off" post. Br. 15. Visa denials, however, are not driven exclusively by the judgment of consular officers; they may reflect the views of the Attorney General or other, Washington-based agency officials. *See* pages 4-5, *supra*. The pleadings here allege that the consular officer's initial judgment was to grant the visa. J.A. 29.

The government cites no case where it has been permitted to restrict a citizen's liberty without any factual support for doing so.[18] Such latitude would render judicial review meaningless and would contravene the fundamental principle that due process requires "notice of the factual basis" for government action, along with a "fair opportunity" to respond, as indispensible safeguards against arbitrary and erroneous action. *Wilkinson*, 545 U.S. at 225-29 (addressing due process requirements in context of transfer to supermax prison); see also *Hamdi*, 542 U.S. at 530, 533-34 (citing *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978), to emphasize that due process exists to protect persons "from the mistaken or unjustified deprivation" and discussing due process requirements for citizens designated as enemy combatants); *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 173 (Frankfurter, J., concurring) (rejecting executive's ability to affect liberty interests based on secret, undisclosed reasons).[19]

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[18] Contrary to what the government implies (Br. 52-53), *Mandel* also involved a factual explanation for the denial of a waiver (namely, Mandel's failure to comply with conditions of prior visas, *see Mandel*, 408 U.S. at 769); the government similarly has provided an explanation for exclusion in the other cases applying *Mandel*. *See* pages 40-41, *supra*. Moreover, while the government argued in *Mandel* that the Attorney General did not need to provide a reason for refusing a waiver because waiver decisions were committed to his "sole and unfettered discretion," that is not the case with initial ineligibility decisions, which require knowledge or a reason to believe that the applicant is ineligible for admission under criteria established by statute.

[19] *Cf. Goss*, 419 U.S. at 579-80 (observing that due process protections would be unnecessary if administrative decisions always followed a "totally accurate, unerring process, never mistaken and never unfair," but "that is not the case, and no one suggests that it is").

Here, Congress has given the Executive authority to exclude based not on criteria that self-evidently would include respondent's husband (*e.g.*, "all who reside in Afghanistan"), but on various criteria related to terrorism that must be applied to each application with the opportunity in some circumstances for rebuttal. See pages 4-6, *supra*. Those criteria are framed in traditional legal standards – including "knows or has reason to believe" and "clear and convincing evidence," see, *e.g.*, 8 U.S.C. §§ 1201(g), 1182(a)(B)(3)(i)(VI) – with which courts are familiar. *Mandel* or "some evidence" review simply demands, as the bare constitutional minimum, that the government provide notice of the required factual basis sufficient for a court to review whether the proffered reasons – if accepted as true – support exclusion under the statute properly construed.

The Complaint here pleads that there is no facially legitimate and bona fide basis for denying the visa, J.A. 37, and that the government did not act in a manner provided by law in denying the visa application. J.A. 40. This claim may and should be adjudicated under the deferential standard set forth in *Mandel* and in *Vajtauer*. Such review could reveal that respondent's husband was excluded based on a misinterpretation of the statute, a failure to comply with the statute, or the absence of any evidentiary support. Cf. *Am. Acad. of Religion*, 573 F.3d at 133-34 (remanding for further consideration where the government may not have complied with the statutory requirement that the visa applicant be given an opportunity to show that the particular ground for exclusion does not exist). Requiring the government to explain the basis for exclusion also enables a citizen to address and potentially overcome any mistakes or concerns within the administrative process itself, ei-

ther on remand to the agency, or through a renewed application or comparable submission. See pages 6-7 and note 7, *supra*. Addressing the government's concerns or correcting any errors, however, is extremely difficult if a citizen is denied any explanation of the government's reason for denial.

3. The government's remaining argument is that requiring the minimal form of due process "threatens to interfere with U.S. national-security and foreign-policy interests" and to leave "an 'unprotected spot in this Nation's armor,'" Br. 46 (citation omitted), including by constituting an "end run around" Section 1182(b)(3). Br. at 44-52. These arguments are unavailing.

a. No authority supports denying due process to U.S. citizens based on generalized national-security or foreign-policy concerns. The government cites *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (Br. 44), but that case involved only the "narrow question" whether the Merit Systems Protection Board "has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action" to terminate a government employee. In contrast, when the government has invoked national security concerns as a basis for depriving a U.S. citizen of due process or other constitutional rights, this Court has rejected the argument.

This Court's "precedents, old and new, make clear that concerns of national security and foreign relations" do not "'automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.'" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010). For example, in *Hamdi*, 542 U.S. 507, this Court held that U.S. citizens detained as enemy combatants have a due pro-

cess right to notice and an opportunity to contest the factual basis for their confinement. While acknowledging "the reluctance of the courts 'to intrude upon the authority of the Executive in military and national security affairs,'" the Court found it "vital" that the "calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship." *Id.* at 531-32 (quoting *Egan*, 484 U.S. at 530). The Court explained that "while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge." *Id.* at 536-37.

In *Webster* v. *Doe*, this Court also rejected the government's argument that judicial review should be precluded based on national security concerns. The statute at issue committed the discharge of CIA employees to the discretion of the Director, and the government asked the Court to preclude judicial review of due process and equal protection claims because "judicial review even of constitutional claims will entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security." 486 U.S. at 604. Citing cases involving *in camera* review and the state secrets privilege, the Court refused to bar judicial review, observing that district courts can balance the employees' "need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.*

Courts in various contexts have developed procedures for accommodating both the government's "legitimate interest in protecting sources and methods of intelligence gathering" *and* the individual rights secured by the Constitution. *Boumediene* v. *Bush*, 553 U.S. 723, 796 (2008) (directing the district court in habeas case involving aliens held as enemy combatants to "use its discretion to accommodate" the government's "legitimate interest in protecting sources and intelligence gathering methods"). Sensitive law-enforcement information can be filed under seal pursuant to a protective order restricting disclosure. See, *e.g.*, *Bismullah* v. *Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007) (habeas corpus action involving enemy combatants), *vacated on other grounds*, 554 U.S. 913 (2008). Classified information, too, may be filed under seal and viewed by counsel with the appropriate security clearance. See, *e.g.*, *Nat'l Council of Resistance of Iran* v. *Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001) (addressing due process rights of organization designated a "foreign terrorist organization," and explaining that government need not disclose classified or sensitive law-enforcement information on the public record). Where counsel do not have such clearance, "the court has inherent authority to review classified material *ex parte*, *in camera* as part of its judicial review function." *Jifrey* v. *Fed. Aviation Admin.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (involving judicial review of revocation of airman certificates of alien pilots designated as security threats). And the government always has the ability to avoid any disclosure of information protected by the state secrets privilege. See, *e.g.*, *United States* v. *Reynolds*, 345 U.S. 1, 9-11 (1953) (information protected by the state secrets privilege).

b. Based on the foregoing, requiring the government to provide some evidence for its action does not improperly evade Section 1182(b)(3). Section 1182(b)(1) specifies the notice that an immigration or consular "officer shall provide the alien" deemed inadmissible under subsection (a). Section 1183(b)(3) then creates an exception to that notice requirement for certain denials. This provision does not purport to limit the due process rights of U.S. citizens or limit the scope of judicial review of a citizen's constitutional claim. And allowing judicial review does not override Congress's determination about what administrative notice consular officers, in the field, are required to provide an alien as a matter of course.

As a result – and especially in light of the judicial processes for protecting sensitive or classified information – there is no inherent conflict between Section 1182(b)(3) and the relief sought here, and no "clear congressional intent" to deny meaningful judicial review of actions affecting the rights of U.S. citizens. See *Webster*, 486 U.S. at 603. Due process and the canon of avoiding constitutional issues thus require that Section 1182(b)(3) be interpreted according to its plain language: It establishes what administrative notice must be given to aliens in the normal course, but it does not eliminate the judicial review available to U.S. citizens.

c. The government's speculation that allowing review in this context "*could* compromise classified or other sensitive information" and have a "chilling effect" (Br. 46, 48 (emphasis added)) also provides no basis to deny judicial review. Contrary to what the government suggests (Br. 51), there already are well-established procedures – in addition to those discussed above – for handling immigration cases implicating national security or other sensitive infor-

mation. Courts *already* review Section 1182(a)(3)(B) determinations in the context of removal and asylum proceedings. See 8 U.S.C. § 1158(b)(2)(A)(v) (aliens ineligible for asylum if inadmissible under Section 1182(a)(3)(B)); *id.* § 1229b(c)(4) (aliens ineligible for cancellation of removal if inadmissible under Section 1182(a)(3)). And administrative agencies already have developed regulations and guidelines for handling classified information for such cases.[20] The fact that the same statutory criteria apply to both visa determinations abroad and removal/asylum proceedings confirms that there is nothing inherently beyond judicial competence to review or handle when an exclusion decision affects the rights of a constitutionally protected person.

Here, moreover, the government has not claimed that the reason for this visa denial is classified or related to an ongoing national-security or law-enforcement investigation. The government also has conceded that some "refusals of visas on Section 1182(a)(2) or (a)(3) grounds to aliens with U.S.-citizen spouses do not involve sensitive criminal or national-security information." Br. 52. Although more than 40 years have passed since *Mandel* was decided, the government has not cited a single case in which a U.S. citizen has brought a challenge to the denial of a

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[20] *See, e.g.*, 8 C.F.R. § 103.2(b)(16)(iii)-(iv) (handling of classified information in connection with benefit requests); *id.* § 241.14(d)(2) (procedures relating to continued detention of aliens "on account of security or terrorism concerns"); *id.* § 1240.11(a)(3), (c)(2), (c)(3)(iv) (relating to removal proceedings); U.S. Dep't of Justice, Operating Policies and Procedures Mem. 09-01, *Classified Information in Immigration Court Proceedings* (2009), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm09/09-01.pdf; U.S. Dep't of Homeland Sec., *Guidelines for the Use of Classified Information in Immigration Proceedings* (2004).

visa under Section 1182(a)(2) or (a)(3) that could not be resolved without the dangerous disclosure of classified or sensitive law enforcement or national security information.

The government cites to *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013) to support its assertion that "[w]idening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure." Br. 51. *Clapper* does not support the preclusion of judicial review here, however, because *Clapper* involved whether attorneys and human rights organizations had standing to challenge the government's electronic surveillance of communications of aliens outside the United States. To resolve the critical question of whether respondents were threatened with imminent risk of injury, respondents suggested that the government could be required to tell the court *in camera* whether it was targeting respondents' communications. *Id.* at 1149 n.4. This Court rejected that suggestion because it was "*respondent's* burden to prove their standing by pointing to specific facts," and because the court decision whether to dismiss the lawsuit for lack of standing would "surely signal to the terrorist whether his name was on the list of surveillance targets." *Id.* (emphasis added). But that is not the case here.

The government has stated that respondent's husband was denied a visa on terrorism-related grounds. See pages 8-9, *supra*. Even assuming that the government's explanation for this denial is classified and must be provided to the district court *in camera* (and the government has never said this is the case), the court's opinion would not necessarily have to disclose the particular subsection and the evidence on which the government based its denial. Instead, when nec-

essary, an opinion can state that the court had reviewed the government's explanation *in camera* and could decline to publish any classified or sensitive information. The courts below thus have ample means to address the government's concerns about classified information. Such concerns do not justify allowing the government arbitrarily to restrict the longstanding liberty interests of U.S. citizens without explanation or judicial review.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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No. 13-1402

BRIEF

In the Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, ET AL.,
PETITIONERS

v.

FAUZIA DIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent has neither a constitutionally protected liberty interest implicated by a consular officer's denial of a visa to her alien spouse abroad nor a right to judicial review of that denial, let alone review under the intrusive standard she urges this Court to adopt. Respondent endorses a major shift in the law that would have harmful repercussions not only in the visa context, but also in many others. Under respondent's approach, both the fundamental doctrine of consular nonreviewability and Congress's judgment that the reasons for denial of a visa on terrorism-related grounds need not be disclosed would be meaningless in any case in which the unsuccessful visa applicant has or acquires a U.S.-citizen spouse (or, potentially, other close family member). Courts would have to engage in a close examination of whether there is sufficient evidence to find the applicant inadmissible—

even if that evidence consists of classified or other sensitive information relating to national security. And courts could second-guess the sensitivity of the information and order its disclosure. In addition, a large class of other persons only indirectly affected by government action against third parties would be free to assert similar claims in a wide variety of circumstances. There is no warrant for altering existing law in that dramatic fashion, at the steep cost of weakening the protections that keep terrorists from our shores.

A. Respondent Has No Constitutionally Protected Liberty Interest Implicated By Denial Of A Visa To Her Alien Spouse Abroad

1. The denial of an immigrant visa to respondent's husband in Afghanistan was based on a statutory provision that requires evaluation of the visa applicant's *own* personal history and characteristics—irrespective of whether the alien's ability to apply for a visa rests on a petition by a U.S.-citizen spouse, a petition by an employer, or an applicant's own entry into the visa "lottery." The challenged government action was not directed at respondent or her marriage relationship; it merely carried out Congress's command that *no* alien, whether married to a U.S. citizen or not, is admissible to the United States if he has certain ties to terrorist activity. See 8 U.S.C. 1182(a)(3)(B). Respondent does not dispute that her husband, as an alien outside the United States, has no statutory or constitutional right to notice of the specific basis for the visa denial or to administrative or judicial review of that denial. See Gov't Br. 6-8, 33-37.

Nothing in the Immigration and Nationality Act (INA) gives respondent a legally cognizable stake in

the denial of the visa to her husband abroad, or any right to notice or an additional explanation—or to judicial review, which is barred by the doctrine of consular nonreviewability. Respondent contends, however, that the Due Process Clause itself affords her those rights, even though her husband—the only party to the visa application and the only person directly affected—has no such constitutional rights. That contention is without merit.

This Court has long held that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980). Respondent's contention that the denial of a visa to her alien husband abroad implicates liberty interests of her own under the Due Process Clause is irreconcilable with that principle. Regardless of whether the denial causes her "hardship," that action simply "does not amount to a deprivation of any interest in life, liberty, or property" of hers under the Fifth Amendment. *Id.* at 784 n.16, 787.

Respondent cannot persuasively distinguish *O'Bannon*. The Court recognized in that case that the government could not withdraw "direct benefits" from nursing home residents (for example, payment of money to the home for their care) "without giving the patients notice and an opportunity for a hearing." 447 U.S. at 786-787. But the Court held that the government's decertification of the home did not deny the residents due process, because the government had directed its action against a third party and had not "impose[d] a direct restraint on [the residents'] liberty." *Id.* at 788. That was true even though the action against the home might have an equally "immediate,

adverse impact" on the residents as withdrawal of direct benefits, including (the Court assumed) "severe emotional and physical hardship" and disruption of "family ties" and other "associational interests." *Id.* at 784 & n.16, 787. Contrary to respondent's suggestion, the Court's holding did not turn solely on an interpretation of the Medicaid statute; it foreclosed the residents' assertion of "any" liberty interest. *Id.* at 787; see *id.* at 784 (residents asserted property interest under statute and "life or liberty" interest not derived from statute); see also *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 766-768 (2005).

Like the residents in *O'Bannon*, respondent claims "severe * * * hardship" and disruption of "family ties," 447 U.S. 784 n.16, because of government action taken against someone else, not against her. Accordingly, the visa denial "directed against a third party" cannot be characterized as "directly affect[ing]" respondent's "legal rights, or impos[ing] a direct restraint on h[er] liberty," but rather affects her "only indirectly or incidentally." *Id.* at 788.

Respondent nevertheless insists (Br. 28-29) that the denial of the visa amounted to direct government action against her because she can play some role in the visa application process (as distinguished from the petition process, in which she established to the satisfaction of the Department of Homeland Security (DHS) that Berashk is her immediate relative). That is incorrect. Berashk was eligible to *apply* for a visa because of the existence of a valid petition filed by respondent. But that did not make respondent a party to Berashk's application or make the denial of the application an adjudication of any rights or protected interests of respondent. Neither did the fact that

respondent had the power to bolster Berashk's application by promising financial assistance or helping gather supporting materials. See, *e.g.*, 8 U.S.C. 1183a(f)(5). The prospect of such aid does not make the decision on the application any less a decision solely about Berashk's own satisfaction of the relevant statutory requirements. See 8 U.S.C. 1182.[1]

More broadly, respondent glancingly suggests (Br. 28) that action taken against one spouse necessarily involves the other in a sufficiently direct way to satisfy the test set forth in *O'Bannon*. But *O'Bannon* itself rejects that proposition. The Court found it self-evident that "members of a family" of an "errant father"—presumably including the father's wife—"have no constitutional right to participate in his trial or sentencing procedures," even if those proceedings cause them "serious trauma." 447 U.S. at 787-788. Spouses are independent human beings who bring their separate legal attributes and disabilities to the marriage, and the legal fictions that once "merged" a

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[1] Respondent's claim (Br. 6) that "it is common to 'overcome' a finding of ineligibility by submitting evidence that the stated reason for ineligibility does not apply" misunderstands State Department statistics. The cited statistics cover only cases in which the stated reason for finding ineligibility was correct but a visa could be issued anyway (usually because of a waiver under 8 U.S.C. 1182(d)), not cases in which a stated reason was later shown to have been incorrect. In any event, Section 1182(b)(3) evinces Congress's unambiguous determination that an applicant need not be told the reasons for a terrorism-related denial, even though that may make it difficult to demonstrate that the relevant statutory ground does not apply. Compare 8 U.S.C. 1182(b)(3) with 8 U.S.C. 1182(a)(3)(B)(i)(VI); see 22 C.F.R. 42.81(b) (providing that "[t]he consular officer shall inform the applicant of the provision of law" on which "the refusal is based," rather than (as in 8 U.S.C. 1182(b)(1)(B)) the "specific provision").

married couple's "existence," *Thompson* v. *Thompson*, 218 U.S. 611, 614 (1910) (discussing coverture), have long since been abandoned. The marriage relationship thus does not give rise to a right in one spouse under the Due Process Clause to participate in proceedings to determine the other's statutory benefits.

Finally, respondent conclusorily asserts (Br. 27-28) that the fundamental due process principle affirmed in *O'Bannon* has no application in a case involving visas in light of *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), and *Fiallo* v. *Bell*, 430 U.S. 787 (1977). But there is no tension between *O'Bannon* and those decisions. *Mandel* involved a U.S. citizen's asserted First Amendment interest in receiving ideas, not recognition of a liberty interest under the Fifth Amendment. See 408 U.S. at 762, 764-765. Moreover, *Mandel* did not rule that the asserted interest permitted the citizen to insert himself into the visa application process or to dispute a consular officer's determination that an alien abroad was inadmissible. *Mandel* involved a waiver decision, not a visa denial, and concluded that a facially legitimate reason already appearing in the record was sufficient (assuming articulation of such a reason was even necessary). Gov't Br. 38-41. In *Fiallo*, the U.S.-citizen plaintiffs were challenging a statutory provision that effectively prevented them even from petitioning for classification of their parents or children as immediate relatives, see 430 U.S. at 790 n.3, 791; Gov't Br. at 2-4, 7-10, *Fiallo*, *supra* (No. 75-6297) (citing 8 U.S.C. 1154(a) (1976))—a request equivalent to respondent's visa petition. Accordingly, nothing in *Fiallo* erodes the fundamental principle of *O'Bannon* that the Due Process Clause does not pro-

tect a person from indirect and incidental effects of government action taken against a third party.

2. Respondent's due process argument fails for another, independently sufficient reason: there is no due-process liberty interest in "the ability to live in the United States with an alien spouse," Pet. App. 7a n.1, or to have the alien spouse admitted to the United States for that purpose. None of the decisions on which respondent relies has anything to do with such an asserted interest, and Congress's plenary control over the admission of aliens compels the conclusion that it is not protected under the Due Process Clause.

There is no question that the "right to marry is part of the fundamental 'right of privacy' implicit" in the due process guarantee. *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978); see *id.* at 386; *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). But the denial of a visa to respondent's husband did not impinge on that right, since she traveled to Afghanistan to marry Berashk years ago and their legal relationship remains intact. See J.A. 28.

This Court has recognized a number of protected interests that surround the marital relationship, including the right to make decisions about contraception and bearing children. See Gov't Br. 22. As respondent concedes (Br. 17), this Court has repeatedly described those as "privacy" interests preventing the government from invading the intimacies associated with the marital bond and from mandating how a married adult orders her life within the confines of her own home. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965) (discussing "the sacred precincts of marital bedrooms").

The claimed liberty interest at issue here is very different. Although respondent states her claimed interest in far more general terms, when described "precise[ly]" and "careful[ly]," *Reno* v. *Flores*, 507 U.S. 292, 302 (1993); *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983), it can be understood only as an interest in having her alien spouse admitted to the United States so that the couple can both live in this country. Such an interest does not involve a private decision by two people who are entitled to settle anywhere in the country, as U.S. citizens and lawful permanent residents generally are. See *Saenz* v. *Roe*, 526 U.S. 489, 510-511 (1999). Rather, it involves a sovereign decision by the United States in controlling its borders—a quintessentially *public* decision about how to "defend[] the country against foreign encroachments and dangers," *Mandel*, 408 U.S. at 765 (citation omitted), and "maintain[] normal international relations," *ibid.* (citation omitted); see *Fiallo*, 430 U.S. at 795 n.6; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); see also *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012) (immigration laws do not "pursue" family unity "to the *n*th degree").

Accordingly, this Court's decisions recognizing an interest in family privacy in no way establish that respondent's asserted liberty interest in having her husband enter this country in the first place "is deeply rooted in this Nation's history and tradition." *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), cited in Resp. Br. 18. To the contrary, the history of Congress's plenary power to exclude aliens, including spouses and other relatives of U.S. citizens, compels the conclusion that the interest respondent claims as "fundamental" finds no grounding

in "[o]ur Nation's history, legal traditions, and practices." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-721 (1997); see generally *Galvan* v. *Press*, 347 U.S. 522, 531 (1954).

Turner v. *Safley*, 482 U.S. 78 (1987), on which respondent relies (Br. 13, 19, 28), in fact underscores the point. In *Turner*, the contours of an asserted liberty interest in marriage were scrutinized in the specific context in which they were asserted: a prison, where the State physically separated the prisoner and his intended for reasons unrelated to any governmental disapproval of their intimate decisions. In that context, the Court recognized, a marriage could remain meaningful as an "expression of personal dedication," an "exercise of religious faith," or a means of obtaining "government benefits." 482 U.S. at 95-96. The Court never suggested that the right to marry in a prison entailed what respondent calls (*e.g.*, Br. 18) "the associational right of a husband and wife to live together."

It thus is clear, as the courts of appeals have long recognized, that there is no tradition in this Nation of recognizing a liberty interest in having one's alien spouse enter and reside in the United States. See Gov't Br. 25-26 & n.9. Respondent suggests (Br. 23) that the relevant court of appeals decisions "fail to address the issue presented here" because they do no more than reject any right "to have a spouse reside in the United States notwithstanding the government's stated, facially legitimate, and bona fide reason for exclusion or removal." That is incorrect. See Gov't Cert. Reply Br. 4-6. Those decisions did not rest on a determination that the government's reason was legitimate or sufficiently explicated—an issue that would

arise only if a U.S. citizen's constitutional rights were at stake. Rather, the courts of appeals have categorically concluded that the "Constitution does not recognize the right of a citizen spouse to have his or her alien spouse" enter or remain in the country, *Bangura* v. *Hansen*, 434 F.3d 487, 496 (6th Cir. 2006) (citation omitted), and have relied on the special considerations relevant to the immigration context in doing so.

Respondent contends (Br. 20-22) that *Mandel* and *Fiallo* illustrate that the immigration context is irrelevant to the existence of a U.S. citizen's asserted liberty interest under the Fifth Amendment. But those decisions illustrate no such thing. The plaintiffs in *Mandel*, which did not even involve the Due Process Clause, conceded that Congress could enact a flat prohibition against the entry of aliens falling within the statutory grounds of inadmissibility and that First Amendment rights could not override that decision, 408 U.S. at 767; and in recognition of the special responsibility the INA vested in the Executive, the Court specifically declined to balance the First Amendment interests of the potential audience against those of the government in denying a waiver in a particular case, *id.* at 768-769. *Fiallo* is no more helpful to respondent's cause. Indeed, the Court in *Fiallo* recited these very same limitations on the reach of *Mandel*. See 430 U.S. at 794-795. And contrary to respondent's assertion (Br. 21), *Fiallo* did not recognize a constitutionally protected "liberty interest in family reunification"; to the contrary, it rejected the notion of any such "fundamental right" in light of "fundamental principles of sovereignty" that apply when "admit[ting] or exclud[ing] foreigners in accordance with perceived national interests." 430 U.S. at

795 n.6. While the Court entertained the U.S.-citizen plaintiffs' challenge on equal protection or other grounds to a statute that effectively barred them from filing visa petitions to have their parents or children classified as immediate relatives, the Court resolved the case by ruling that congressional policy choices on such issues are "wholly outside the power of this Court to control." *Id.* at 799 (citation omitted); see *id.* at 791, 793-796, 798.

3. Finally, respondent disputes (Br. 29-30) that a ruling for her would give rise to a flood of new constitutional claims. Respondent is wrong.

Respondent's attempt to minimize the number of possible cases like hers is unavailing. Although the reason for a visa denial is more likely to be known to the alien when a criminal conviction is at stake, there is no reason to assume that in every such case the alien would be candid with a U.S. spouse about that conviction or that the spouse would refrain from challenging the reason for the visa denial. Moreover, even setting aside denials based on criminal convictions or criminal acts under Section 1182(a)(2)(A) and (B), in Fiscal Year 2013 alone more than 400 aliens applied for immigrant visas (and many more for nonimmigrant visas) as the spouse, child under the age of 21, or parent of a U.S. citizen and were refused on Section 1182(a)(2) and (3) grounds. See Gov't Br. 31 n.10 (citing table). If respondent prevails, all such denials could give rise to constitutional claims.

With respect to challenges by family members in other areas, as where a spouse is to be removed or incarcerated, respondent engages in sleight of hand. She contends that such a challenge could never be successful because the process already afforded the

directly affected spouse would satisfy what she calls "*Mandel* review." See Br. 29-30. But the review afforded in *Mandel* was limited because of considerations specific to the exclusion of aliens, where the political Branches' powers are at their height. See 408 U.S. at 765-770. It is hard to see why litigants in other contexts would be content with only such limited review in an attempt to vindicate rights they view as fundamental, or why courts would constrain their claims in that fashion. In addition, family members could assert that any process already afforded was insufficient, or challenge a removal order or sentence in which an alien or a convicted defendant has acquiesced.

Thus, respondent's approach does threaten tremendous disruption. If due process claims like respondent's could be brought based on the "weight" of a harm without regard to its indirect "*nature*," *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (1972), then family members could assert constitutional claims whenever a close relative is ordered removed, imprisoned, drafted, or quarantined. The door would also be opened for patients to challenge on due process grounds a publicly owned utility's decision to cut off power to a treatment facility because of non-payment of bills, see *O'Bannon*, 447 U.S. at 788; for employees of a government contractor to allege a due process violation when the government's decision to cancel a contract substantially affects them, cf. *id.* at 788 n.21; and for an attorney's clients to challenge a government decision that he is no longer qualified to practice. Such consequences would indeed "work a sea change in the law." Gov't Br. 31.

B. The Court Of Appeals Erred In Imposing Judicial Review And Extra-Statutory Procedural Requirements On A Consular Officer's Visa Determination

1. It is firmly established in this Court's precedents that Congress has the power to "prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Wong Wing* v. *United States*, 163 U.S. 228, 232-234 (1896) (citation omitted). The Ninth Circuit had no basis for imposing extra-statutory procedural requirements and a regime of judicial review of visa denials that is directly contrary to the doctrine of consular nonreviewability.

Respondent ignores the meaningful process that takes place in connection with immigrant visa applications. When a U.S. citizen submits a visa petition to classify an alien as an immediate relative, DHS reviews it. If the petition is approved, the alien submits a visa application; a consular officer scrutinizes that application, interviews the alien in person, and then takes action. In addition, final denial of a visa is subject to review by the principal consular officer at the relevant post (or that officer's designated alternate). See 22 C.F.R. 42.81(c) and (d); see also Gov't Br. 49 (noting that State Department analysts assist consular officers in connection with security-based denials).

Respondent nonetheless asserts that judicial review, and additional legal and factual explanation by the consular officer, are required as a matter of due process to guard against an "arbitrary" interference with the liberty interest she asserts. But the refusal of the visa was an action concerning respondent's husband, not her, and this Court has made clear that

whatever procedure Congress prescribes even for the admission of aliens who have reached our shores is all the process that is due under the Constitution. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950). A visa denial following such a process, here augmented by Executive Branch procedures, therefore cannot be deemed "arbitrary" in violation of the Due Process Clause, either for Berashk himself, who is outside the country, or for respondent, who is only indirectly affected.

Respondent struggles in vain to evade that conclusion. She relies (*e.g.*, Br. 33-35, 37-39) on due process cases involving a variety of topics such as prisons, immigration removal, and admissions to the state bar—all cases in which the consular nonreviewability doctrine was not even conceivably at stake. See, *e.g.*, *Knauff*, 338 U.S. at 543 ("Whatever the rule may be concerning deportation * * * , it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."). And she invokes a general presumption of judicial review (*e.g.*, Br. 35)—but the rule with respect to the denial of a visa is just the opposite. See *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) ("When it comes to matters touching on national security or foreign affairs—and visa determinations are such matters—the presumption of review 'runs aground.'") (quoting *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988)).

Respondent also asserts (Br. 36-37) that the consular nonreviewability doctrine applies only to review sought by aliens, not by a U.S. citizen. That cannot be correct. If the doctrine bars review at the behest of

the unsuccessful visa applicant himself, then *a fortiori* it bars review at the behest of a U.S.-citizen relative, whose interests are indirect and derivative of those of the alien applicant. If respondent were correct, then a significant subset of aliens could evade the doctrine by using their family members to obtain the intervention of U.S. courts, contrary to the statutory scheme. See Gov't Br. 36-37. Moreover, a number of the Court's decisions in this area would have essentially turned on a litigating mistake or a technicality, because they would have come out differently if only an obviously interested U.S.-citizen family member had brought his or her own claim. See, *e.g.*, *Knauff*, 338 U.S. at 543, 546-547 (involving "war bride" of U.S. citizen); *id.* at 551 (Jackson, J., dissenting) (stating that the U.S. citizen "went to court and sought a writ of *habeas corpus*" for his alien wife). This Court's statements about the political Branches' plenary powers in this area are not limited to suits brought by aliens, see, *e.g.*, *Wong Wing*, 163 U.S. at 232-234; *Knauff*, 338 U.S. at 543, and the nonreviewability doctrine reaches much more deeply into the fabric of the law than respondent allows, see generally *Ingraham* v. *Wright*, 430 U.S. 651, 679 (1977) (emphasizing the important role that history and tradition play in determining what procedures are required).

Mandel does not suggest a different result. That decision accepted as sufficient a very limited review of an individualized admissibility *waiver* denial challenged on First Amendment grounds, without holding that such review was required, and it emphasized the broad scope of Congress's plenary power in this area. See 408 U.S. at 765-767, 769-770. Whatever review might be afforded under 8 U.S.C. 1182(d)(3)(A)(i) in

that context would not carry over to the denial of a visa to an alien abroad by a consular officer. Contrary to respondent's argument, a consular officer acting on a visa application does not exercise any discretion to bestow or withhold a visa, but simply carries out statutory commands that are themselves "facially legitimate" as *Mandel* defined that concept. See *id.* at 769-770.

Respondent and her amici (Br. 4-5; Former Consular Officers Amicus Br. 4-26) try to undermine the doctrine of consular nonreviewability by suggesting that other agencies have taken over the function of deciding whether an alien is eligible for a visa. That suggestion is incorrect, and in any event irrelevant to the long-established bar to judicial review. When reviewing visa applications, consular officers do draw on various sources of information available to the federal government, as would be expected in protecting the national security. See 8 U.S.C. 1105; Gov't Br. 5. But consular officers do not automatically deny a visa application pursuant to Section 1182(a)(3)(B) when there is a "hit" in the terrorist screening database (or another database). Inclusion in the terrorist screening database merely gives an indication that the government may be in possession of information that would support such a denial, and therefore initiates a review of the underlying information to determine whether the applicant is admissible. See, *e.g.*, *Ibrahim* v. *DHS*, 2014 WL 6609111, at *9 (N.D. Cal. Jan. 14, 2014); see also *id.* at *5, *19 (explaining that visa denial by consular officer was based on classified information that was separate and apart from mistaken inclusion of plaintiff on no-fly list); 9 *Foreign Affairs Manual* § 40.6 nn.1, 3.1-3.5 (explaining that DHS

determinations are subject to reexamination except when the alien has previously sought admission at a port of entry and been definitively found inadmissible by DHS on a permanent basis, in which case the consular officer will tell the alien to raise the issue with DHS).[2]

2. Even if some judicial review of the visa denial were required in this case, the decision below would still be wrong. The Ninth Circuit held that the government cannot defend a visa denial as facially legitimate without identifying the specific subsection of Section 1182 under which there was reason to believe the alien was inadmissible and the factual information on which the denial rested. There is no warrant in the Constitution for requiring provision of that detailed information, and such a requirement would threaten

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[2] The former consular officers' amicus brief inaccurately portrays *Ibrahim* as well as DHS's role in the visa process. The Secretary of Homeland Security can direct refusal of a visa, see 6 U.S.C. 236(b), but that is a rare occurrence—and the provision granting that power makes clear that Congress intended no alteration of the consular nonreviewability doctrine. See 6 U.S.C. 236(f); *Homeland Security Act of 2002: Hearing and Markup on H.R. 5005 Before the House Comm. on International Relations*, 107th Cong., 2d Sess. 89 (2002) ("By transferring to the Secretary of Homeland Security exactly these authorities currently vested in the Secretary of State, and by explicitly providing that no private rights of action are created, our amendment will ensure that denials of visa petitions in our overseas posts will continue to be non-reviewable."). DHS also provides personnel at some posts who can make recommendations to consular officers about visa decisions, but those recommendations are not binding. See H.R. Doc. No. 131, 108th Cong., 1st Sess. § 6(e) and (f), at 10-11 (2003); Statement of Edward J. Ramotowski, *Hearing before the Subcomm. on National Security of the House Comm. on Oversight and Government Reform*, 113th Cong., 1st Sess. 44-45 (2013).

significant harm to national security at a time when the risk of undetected terrorist incursions into this Nation is high.

The review mandated by the Ninth Circuit calls for a far more intrusive inquiry than the "facially legitimate" standard deemed sufficient in *Mandel*. Respondent repeatedly tries to blur that point (*e.g.*, Br. 14, 31-32) by asserting that "facially legitimate" is equivalent to "supported by some evidence," such that the denial cannot be sustained unless its underlying factual basis is established to the satisfaction of a court. But those standards are not at all equivalent. In *Mandel* itself, the Court deemed the government's reason for the waiver *facially* legitimate without asking whether there was any evidence supporting the reason provided. See Gov't Br. 53. And the cases on which respondent relies to show the asserted equivalency between the two standards illustrate their differences. See *Superintendent* v. *Hill*, 472 U.S. 445, 455-456 (1985), cited in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 527-528 (2004) (opinion of O'Connor, J.).

By expanding the scope of review to include a requirement that the government explain the legal and factual basis for a visa denial, the Ninth Circuit has rendered Congress's judgment in Section 1182(b)(3)—that when a denial is based on national-security grounds no specific reason need be provided to the alien—essentially meaningless for any alien with a U.S.-citizen spouse. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (mandating confidentiality of visa records). The new requirement also would work an end-run around this Court's decisions permitting information relating to the entry of aliens to be withheld if it would "endanger the public security."

Knauff, 338 U.S. at 544. Respondent virtually ignores those authorities; she says (*e.g.*, Br. 49) that they do not apply directly to a claimant like her, without grappling with the fact they do not contemplate that a claim like hers could ever be permitted to proceed in the first place. See, *e.g.*, 338 U.S. at 544 (permitting security analysis based on "confidential information"); *id.* at 547 (stating that when "members" of the "armed forces" married abroad, their alien spouses "had to stand the test of security").

Although respondent attempts (Br. 46-52) to downplay any national-security risks that would result from ignoring established bars to disclosure and judicial review, such risks, and the intrusion on the responsibilities of the political Branches, are very real indeed. The fact that this Court has allowed certain other constitutional claims to proceed in the face of national-security concerns (see Br. 46-47) says nothing about judicial scrutiny and procedural oversight of the denial of a visa to an alien outside the United States who has no constitutional rights in seeking admission. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (stating that "when it comes to collecting evidence and drawing factual inferences" with regard to "national security and foreign policy concerns," the "lack of competence on the part of the courts is marked, * * * and respect for the Government's conclusions is appropriate") (citation and internal quotation marks omitted); see also *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-492 (1999) (stating that "[t]he Executive should not have to disclose its 'real' reasons" for removing an alien believed to be a member of a terrorist organization, thereby "disclos[ing] * * * foreign-policy ob-

jectives and * * * foreign-intelligence products and techniques," and noting that courts are "ill equipped" to evaluate such reasons and "utterly unable to assess their adequacy"). Requiring the kind of disclosure detailed by the Ninth Circuit would carry a significant risk that classified or sensitive information would fall into the wrong hands. It would also likely discourage the sources of such information from providing it to the State Department in the first place, thus increasing the chances that terrorists would gain admission to the United States. See Gov't Br. 45-50.

Respondent's primary answer (Br. 47-51) is to suggest that the government can protect classified (or other sensitive) information by filing under seal or asserting privilege and that courts can review such information in camera and ex parte. But even if such procedures were appropriate, courts may be willing to employ them only in limited circumstances. See Gov't Br. 51. Because consular officers are required to deny a visa if they have reason to believe an alien falls within an inadmissibility category in Section 1182, the government could not, through the use of discretion, avoid having particularly sensitive cases brought to court. In addition, even if appropriate safeguards existed and were in place, there would be a danger that they would fail, which alone could have a chilling effect on sources that provide the United States with intelligence critical to enforcement of Section 1182(a)(3)(B).

All of these considerations lead to one conclusion: if the Court were now to fashion a judicial exception to the long-established consular-nonreviewability doctrine, review should be no more expansive than that found sufficient in *Mandel*. In that case, the Court

made clear that a balancing of the government's interests against the citizen's interests was not permitted. See 408 U.S. at 765-769 (describing the "dangers and the undesirability" of such balancing). Respondent traveled to Afghanistan to marry Berashk knowing that there was no guarantee that he could obtain an immigrant visa; her interest in the visa decision is indirect and derivative of the interest of a person who has no constitutional rights at all in connection with his request for the privilege of admission to the United States. In contrast, the government's sovereign interest in controlling admission of aliens to the United States and ensuring that terrorists are excluded is an "urgent objective of the highest order," *Humanitarian Law Project*, 561 U.S. at 28, and one that the review envisioned by the Ninth Circuit would threaten.

Moreover, any additional scrutiny of a visa denial would be of little benefit. Although amici suggest that consular officers "frequently" make errors in cases like Berashk's, that is pure speculation. See NIJC Amicus Br. 11-12 (citing law review articles, including several pointing to an analysis of procedures in 1978); see also *Mackey* v. *Montrym*, 443 U.S. 1, 14 (1979) (stating that consideration of "risk of error" should look to "the generality of cases" and not "rare exceptions") (citation omitted). Consular officers employ a statutory "reason to believe" standard that is designed to err on the side of caution and can be applied in an ex parte manner. Cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 121-122 (1975) (contrasting probable cause with preponderance standard and emphasizing reliability of ex parte determination of probable cause); *Florida* v. *Harris*, 133 S. Ct. 1050, 1055 (2013). The statutory

grounds for national-security-related inadmissibility are broadly stated. See 8 U.S.C. 1182(a)(3); Pub. L. No. 107-56, 115 Stat. 272 (broadening grounds in wake of 9/11 attacks); see also, *e.g.*, *Singh-Kaur* v. *Ashcroft*, 385 F.3d 293, 298-299 (3d Cir. 2004). And a reviewing court could not order the issuance of a visa, as respondent concedes (Br. 41); at most, the court could remand for further consideration, and might do so (in respondent's view, Br. 51-52) based on ex parte submissions that a plaintiff would never see or evaluate.

If the narrow "facially legitimate" standard applied in *Mandel* were applied to this case, the reason for visa denial that the consular post provided to Berashk—a citation to Section 1182(a)(3)(B), indicating that the denial was based on terrorist activities—clearly suffices. Respondent's plea for disclosure of evidence underlying a reason to believe that Berashk fits within the Section 1182(a)(3)(B) admissibility bar is contrary to the very limited scope of the facial-legitimacy review that disposed of *Mandel*, and would impermissibly "look behind" the consular officer's decision, opening the way to substitution of a court's assessment for the expert officer's. *Mandel*, 408 U.S. at 770. So, too, would an attempt to assess interpretation of the statutory criteria, since that would occur in the abstract and lack the very analysis of underlying facts in which the *Mandel* Court refused to engage.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

FEBRUARY 2015

AMICUS CURIAE BRIEF

13-1402

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, *et al.*,

Petitioners,

—v.—

FAUZIA DIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I. In the intervening eight decades, the ACLU has frequently appeared before this Court during other periods of national crisis when concerns about security have been used by the government as a justification for abridging individual rights. The ACLU and its state affiliates have litigated and engaged in advocacy on behalf of American citizens and organizations whose constitutional rights have been affected by visa denials, including representing before this Court the members of Congress, university professors, journalists and religious leaders who were the respondents in *Reagan v. Abourezk*, 484 U.S. 1 (1987).

SUMMARY OF ARGUMENT

In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), this Court recognized that in certain contexts the government's exclusion of foreign citizens from the United States can implicate the First Amendment rights of U.S. citizens, and it established that in such

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part and no one other than *amicus curiae*, its members or its counsel has made a monetary contribution to fund the preparation or submission of this brief.

contexts U.S. citizens can call on the federal courts to review the lawfulness of the exclusions. In this case, the government contends that *Mandel* does not require judicial review of exclusions; that, to the extent it does, it authorizes review only of discretionary waiver decisions, and not of determinations relating to statutory inadmissibility; and that in any event it should not be read to have sanctioned judicial review of inadmissibility determinations in the national security context. To accept these propositions would be to depart from decades of case law in which the lower courts have capably and carefully applied the *Mandel* standard, and would render meaningless the First Amendment rights this Court recognized in *Mandel* and many other cases. *Amicus* respectfully submits this brief to explain why limited judicial review of exclusions that implicate the constitutional rights of U.S. citizens is both workable and necessary, and to illustrate the dangers of the position that the government has advanced in this case by highlighting the history of ideological exclusions.[2]

Since at least the Second World War, administrations of both parties have engaged in the practice of "ideological exclusion," denying visas to foreign citizens with disfavored political viewpoints. These exclusions have deprived U.S. citizens of the opportunity to engage with some of the world's leading writers and artists. Where exclusions implicate U.S. citizens' constitutional rights, judicial review is necessary to safeguard those

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[2] *Amicus* agrees with Respondent that government interference with spousal cohabitation implicates the protections of the Due Process Clause, but this brief does not address this issue.

rights. It is also necessary to ensure that the executive does not disregard Congress's decisions as to which classes of noncitizens should be permitted to enter. The experience of lower courts since *Mandel* has shown that the judiciary is capable of reviewing the lawfulness of exclusions without encroaching on authority committed by the Constitution to the executive and legislative branches. It has also shown that the judiciary is capable of reviewing security-based exclusions without compromising the confidentiality of properly classified information.

ARGUMENT

I. JUDICIAL REVIEW UNDER *MANDEL* HAS BEEN CRITICAL TO PRESERVING THE SEPARATION OF POWERS AND ENSURING THAT THE GOVERNMENT DOES NOT USE THE IMMIGRATION LAWS AS INSTRUMENTS OF CENSORSHIP.

This Court has recognized that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). In a decision that is essential to protecting this right, over forty years ago this Court unanimously rejected the government's argument that the exclusion of a foreign speaker "involves no restriction on [the] First Amendment rights" of American citizens who have invited the speaker and seek face-to-face interaction. *Kleindienst*

v. Mandel, 408 U.S. 753, 764 (1972).[3] Unwilling to leave U.S. citizens' First Amendment rights to the mercy of the executive branch, the *Mandel* Court held that U.S. citizens may seek judicial review of exclusions that implicate their First Amendment rights. *Mandel*, 408 U.S. at 769–70.

The *Mandel* Court expressly recognized Congress's plenary power "to make policies and rules for exclusion of aliens," and accordingly it did not contemplate that the judiciary would apply traditional First Amendment scrutiny to the government's visa decisions. Instead, it instructed that judicial review would be limited to determining whether the Executive's justification for excluding the noncitizen is "facially legitimate and bona fide," *id.* at 770. This limited review accommodated Congress's constitutional authority over immigration as well as the Executive's constitutional authority over foreign affairs and national security. It did so, however, without abdicating the Judiciary's role in protecting both the First Amendment and the constitutional separation of powers. Lower courts

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[3] The State Department has acknowledged its understanding that exclusion decisions carry significant implications for the First Amendment rights of U.S. citizens. *See* Letter from Harold Hongju Koh, Legal Advisor to the State Department, to Joanne Lin, Legislative Counsel for the ACLU (December 22, 2010), *available at* https://www.aclu.org/files/assets/KMBT20020110106134304.pdf (stating that the State Department will, in exercising its discretionary waiver authority, "give significant and sympathetic weight to the fact that the primary purpose of the visa applicant's travel will be to assume a university teaching post, to fulfill speaking engagements, to attend academic conferences, or for similar expressive or educational activities").

have carefully respected the balance that this Court struck in *Mandel*. *See, e.g., Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009) (reading *Mandel* to require only "the identification of a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category"); *cf. T-Mobile South, LLC v. City of Roswell*, 2015 WL 159278 (U.S. Jan. 14, 2015) (meaningful judicial review requires administrative decisionmakers to explain the reasons for their action).

In its brief, the government relies heavily on the fact that Congress has plenary power over immigration, and it contends that this power requires deference to the political branches in the circumstances presented here. Accordingly, it bears emphasis that the Executive has no authority to deny visas except in accordance with Congressional will. Nor may the Executive claim for itself the judicial deference accorded to Congress's plenary power to make rules for admission when the Executive acts in contravention of congressional enactment. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (the judiciary plays a key role in "maintain[ing] the 'delicate balance of governance' that is itself the surest safeguard of

liberty" (citation omitted)). *See also Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (observing that the Executive's power over admission and exclusion "extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations," and stating that it remains "the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie") (Ginsberg, J.), *aff'd by an equally divided court*, 484 U.S. 1 (1987) (per curiam).

Judicial review of exclusions that implicate Americans' First Amendment rights is crucial to protecting both the First Amendment and the separation of powers. As discussed below, the experience of the lower courts since *Mandel* confirms that the balance struck in *Mandel* was the correct one.

A. The McGovern Amendment Cases

In 1952, Congress overrode President Truman's veto and passed the Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, 66 Stat. 163 (1952), which sought to protect Americans from, *inter alia*, the subversive influence of foreigners alleged to advocate communist, anarchist, or totalitarian doctrines.[4] The McCarran-Walter Act included a provision, former INA § 212(a)(28), that denied admission to any

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[4] President Truman's veto was rooted in his deep misgiving about the law. President Truman characterized aspects of the bill as "thought control" and observed that "'[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike . . . .'" 98 Cong. Rec. 8082, 8084 (1952).

foreigner who believed in communism or anarchism, wrote about those doctrines, or had ever belonged to an organization that promoted those doctrines directly or indirectly. Once a foreigner was deemed to fall within the scope of this ideological-exclusion provision, admission was available only if the Attorney General granted a discretionary waiver.

The consequence of the provision was that Americans were hindered in receiving ideas from many of the world's leading thinkers. Applying the McCarran-Walter Act, the State Department excluded foreign speakers including British author Graham Greene; Pierre Trudeau, who later became Prime Minister of Canada; Palestinian poet Mahmood Darwish; British writer and Nobel Laureate Doris Lessing; Mexican writer and Nobel Laureate Carlos Fuentes; Colombian novelist and Nobel Laureate Gabriel Garcia Marquez; Italian playwright and Nobel Laureate Dario Fo; and Chilean poet and Nobel Laureate Pablo Neruda. *See* ACLU, The Excluded: Ideological Exclusion and the War on Ideas (2007), *available at* http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf. Notably, the use of the provision was a constant across administrations: both Democratic and Republican administrations made use of the Act to prevent Americans from meeting with and hearing from foreign speakers with disfavored political viewpoints.

As the number of McCarran-Walter Act exclusions mounted, the United States' barring of speakers became a source of embarrassment and gave rise to broad concern about the implications of these exclusions for the rights of Americans. *See, e.g.*, Editorial, *The Fuentes Incident*, N.Y. Times, Mar. 5,

1969 ("One sure way to tarnish the United States is for some bureaucrat to decide that a writer, painter or other artist is an 'undesirable alien' because of his work or beliefs."); Editorial, *The Age of Suspicion, Still Ticking*, N.Y. Times, Feb. 24, 1977 ("The clear implication [of the McCarran-Walter Act] was and is that the United States, bulwark of free government and free expression, fears contagious ideas as much as it fears contagious diseases."). Moreover, by 1977 it was clear to Congress that the broad grounds for ideological exclusion in the McCarran-Walter Act could not be reconciled with the United States' commitment in the recently-signed Helsinki Human Rights Accords to reduce "barriers to the free movement of people and ideas." S. Rep. No. 95-194, at 13, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 1625, 1635; H.R. Conf. Rep. No. 95-537, at 31-32, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 1658, 1661-62.

Seeking to stem the tide of ideological exclusions, Congress passed the "McGovern Amendment," which amended the waiver provision for exclusions based upon membership in, or affiliation with, a "subversive" organization. The McGovern Amendment instructed that the Secretary of State should recommend to the Attorney General that this ground of exclusion, then-INA § 212(a)(28), be waived unless the Secretary certified to Congress that such a waiver would implicate the security interests of the United States. *See* Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, sec. 112, § 21, 91 Stat. 844, 848 (1977). The McGovern Amendment tightly curtailed the broad discretion over ideological exclusion that Congress had previously granted to the Executive—the

exercise of which had been at issue in *Mandel*. Congress now required that the Executive could refuse entry to a non-citizen under then-INA § 212(a)(28) only if the Secretary of State was willing to attest that the noncitizen presented a threat to the nation's security.

In several cases where personal certification to Congress would have proven embarrassing to the United States, the Executive attempted to sidestep the McGovern Amendment by basing exclusions on an inapplicable provision of the INA that did not permit waiver. Specifically, the Executive shifted its asserted justification for ideological exclusions from then-INA § 212(a)(28), which triggered the McGovern Amendment's requirement of waiver or certification, to then-INA § 212(a)(27), a provision that categorically barred admission to noncitizens who were believed to be seeking entry to the United States in order "to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Multiple cases were brought by American citizens in response to the Executive's misuse of subsection 212(a)(27). Collectively, these cases demonstrate that judicial review in the visa denial context is both workable and necessary.

In *Abourezk v. Reagan*, the D.C. Circuit considered consolidated cases in which the Executive had relied on subsection 212(a)(27) to stymie numerous American citizens and nonprofit groups — including "members of Congress, university professors, journalists, and religious leaders"—from meeting with, among others, Nino Pasti, NATO's former top nuclear strategist, a four star general in

the Italian Air Force who had served as a member of the Italian Senate and the Vice-Supreme Commander in Europe for Nuclear Affairs. 785 F.2d at 1048. Mr. Pasti, who had visited the U.S. on numerous occasions and spoken frequently on nuclear disarmament, sought a visa at the invitation of American citizen groups interested in hearing him speak on nuclear policy. His invitation coincided with a significant debate within the United States as to whether Pershing II nuclear missiles should be deployed in Europe. Mr. Pasti was initially informed by the consular officer in Rome that he was subject to exclusion under subsection 212(a)(28) on the grounds of his affiliation with an allegedly subversive organization, the "World Peace Council, an organization which the State Department believe[d] to be controlled by the Soviet Communist Party." *Id.* at 1048. However, when he sought a waiver of this ground, which would have been subject to a near-automatic grant under the McGovern Amendment, *see id.* at 1060 n.23, he was informed—without explanation—that his visa had instead been denied under subsection 212(a)(27), *see id.* at 1048, the non-waivable, security-based provision.

The D.C. Circuit rejected the argument that the government's actions were beyond review, and it rejected the government's reliance on subsection 212(a)(27) to evade the restrictions imposed in subsection 212(a)(28). [5] It wrote: "If the State

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[5] Although Judge Bork dissented from the majority's statutory analysis, his dissent recognized that the judiciary had a role to play in reviewing visa denials that implicated the rights of U.S. citizens. *Abourezk*, 785 F.2d at 1062 n.1 (noting that the government "concede[d] that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to

Department's current policy entails the power to achieve precisely the same results as under subsection (28) before the McGovern Amendment, then it is small virtue that those results now can be achieved without explicitly reviving a policy of ideological exclusion" that Congress had rejected. *Id.* at 1058 n.20. The court noted that its review of the Executive's decision was not an intrusion into the province of the political branches; rather, review was necessary to ensure that the executive "respect[ed] the restraints [that] Congress imposed." *Id.* at 1061; *see also id.* at 1057 ("The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28).").[6]

The First Circuit evaluated a similar State Department action in *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). That case concerned the rights of various U.S. citizens and community groups to meet with and hear from Hortensia de Allende, the widow of Dr. Salvador Allende, who had been ousted as Chile's president in a military coup. Mrs. Allende had received "numerous requests for speaking

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meet with excluded aliens have standing to raise a constitutional (first amendment) claim") (Bork, J. dissenting).

[6] On remand, the district court granted summary judgment to plaintiffs, finding that the State Department's interpretation of subsection 212(a)(27) was erroneous and could not support a visa denial. *City of New York v. Baker*, 878 F.2d 507, 509 (D.C. Cir. 1989). The D.C. Circuit concluded that the court could not order that a visa be granted to Mr. Pasti, but ordered that, "should Pasti reapply for a nonimmigrant visa, the State Department will process his application subject to applicable law as interpreted in the district court's decision." *Id.* at 512.

engagements from both religious and educational institutions in California," which sought to receive Mrs. Allende's ideas "on various issues raised by the contemporary political and social situation in Latin America, including the role of women in the struggle for human rights, the plight of women in exile, and the different options available to the United States in its policies toward the nations of Latin America." *Allende*, 845 F.2d at 1113. As in the case of Mr. Pasti, the State Department first informed Mrs. Allende that her affiliation with ideological organizations (the World Peace Council and the Women's International Democratic Federation) rendered her ineligible for a visa under subsection 212(a)(28), a statutory ground that would have triggered a near-automatic waiver grant under the McGovern Amendment. *Id.* Before a waiver could be granted, however, the agency informed Mrs. Allende that her visa was instead denied under non-waiveable subsection 212(a)(27). *Id.* at 1114.

The First Circuit considered and rejected the government's proposed construction of subsection 212(a)(27), emphasizing the consequences of the interpretation of the INA that the government advanced: "By reading subsection 27 to permit status-based exclusions where the State Department determines that entry would harm the foreign policy interests of the United States, we would reinsert the very discretion which the McGovern Amendment sought to diminish." *Id.* at 1118 n.14. After evaluating the government's interpretation of the statutory ground of exclusion, as well as classified and unclassified evidence submitted by the government in support of the visa denial, the First Circuit concluded that "the government ha[d] failed

to advance a sound basis for exclusion under subsection 27." *Id.* at 1116. Mrs. Allende was eventually admitted to the United States and entered without incident.[7]

In *Abourezk* and *Allende*, the Executive sought to exclude speakers who could authoritatively advance positions that were contrary to the government's favored policies. In both cases, the courts of appeal refused to accept the government's attempts to evade Congress's limitation on the Executive's ability to exclude individuals on the basis of their political viewpoints. In both cases, the courts rejected the Executive's insistence that its actions were too sensitive for judicial review. The resulting judicial scrutiny, although carefully limited in accordance with the *Mandel* standard, was vital to maintaining the balance of powers. The judiciary's limited review also guarded against arbitrary deprivation of the First Amendment rights of Americans who sought to receive information from Mr. Pasti and Mrs. Allende, but who were barred from doing so without legitimate reason grounded in the statute.

The McGovern Amendment cases belie the government's argument here that it is "outside the judiciary's realm" to "examine the 'facial[] legitima[cy]' of a statutorily grounded determination

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[7] Then-Judge Breyer concurred in the opinion, finding the case moot in light of an intervening change in law and the ability of plaintiffs to obtain "speedy review" if Mrs. Allende were denied a visa in the future, but noting "agree[ment] with the panel's opinion in respect to the merits." *Allende*, 845 F.2d at 1122 (Breyer J., concurring).

by a consular officer." Pet. Br. at 39. Far from "put[ting] courts in the untenable position of second-guessing Congress's choices about which aliens abroad should and should not be granted visas," *id.*, the availability of carefully-limited judicial review has proven essential to safeguarding Americans' constitutional rights and ensuring that the Executive does not disregard Congress's decisions as to which classes of noncitizens should be permitted to enter the United States.

B. The Moynihan-Frank Amendment and Subsequent Litigation

In 1987, Congress acted to further curtail the Executive's ability to exclude foreign speakers. Stating in the legislative history that "[f]or many years, the United States has embarrassed itself by excluding prominent foreigners from visiting the United States solely because of their political beliefs," Congress amended the INA "to take away the executive branch's authority to deny visas to foreigners solely because of the foreigner's political beliefs or because of his anticipated speech in the United States." S. Rep. No. 100-75 at 11, 100th Cong., 1st Sess. (1987), *reprinted in* 133 Cong. Rec. S2326 (1987). The Senate Committee on Foreign Relations characterized the resulting "Moynihan-Frank Amendment" as an "affirmation of the principles of the First Amendment." *Id.* The House Conference Committee noted that, as a result of decades of ideological exclusion, "the citizens of the United States have been denied the opportunity to have access to the full spectrum of international opinion, and the reputation of the United States as an open society, tolerant of divergent ideas, has

suffered." H.R. Conf. Rep No. 100-475, 100th Cong., 1st Sess. 163 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2314, 2424, *and in* 133 Cong. Rec. 11,343 (1987).

Through the Moynihan-Frank Amendment, Congress proscribed denial of a visa to any alien "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States," subject to certain limited exceptions. Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1400 (1987), *amended by* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991; H.R. Conf. Rep. No. 343, § 128(b) 101st Cong., 1st Sess. (1989). Although the Moynihan-Frank Amendment contained a sunset provision, it was extended by Congress for an additional two years. *See* FY 1989 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461, 102 Stat. 2268 (1988).

Congress subsequently made the Moynihan-Frank changes permanent with passage of the Immigration Act of 1990. Pub. L. 101-649, 104 Stat. 4978 (1990). Following passage of the 1990 Act, noncitizens could not be excluded on the basis of beliefs, statements, or associations unless the Secretary of State personally certified to Congress that admission would compromise a compelling United States foreign policy interest. 8 U.S.C. § 1182(a)(3)(C). The legislative history explained that Congress intended that "exclusions not be based merely on, for example, the possible content of an alien's speech in this country"; that the Secretary of

State's authority to determine that entry would compromise foreign policy interests be used "sparingly and not merely because there is a likelihood that an alien will make critical remarks about the Unites States or its policies"; and that the "compelling foreign policy interest" standard be applied stringently. H.R. Conf. Rep. No. 101-955, 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6794.

Although Congress had repeatedly curtailed the State Department's policies of ideological exclusion, foreign speakers were again targeted for exclusion following the September 2001 terrorist attacks. The litigation that arose from these exclusions confirms once again the crucial importance of judicial review where the government's visa denials implicate U.S. citizens' First Amendment rights.

In a case that garnered significant media attention, the government barred Tariq Ramadan, a Swiss national and world-renowned scholar who had frequently lectured in the United States, from entering this country to accept a tenured position with the University of Notre Dame. Mr. Ramadan's visa was approved in May 2004, but on July 28, 2004, the United States Embassy in Bern revoked his visa without providing him an explanation. In response to press inquiries, "a DHS spokesperson stated that the basis for the revocation was a provision of the INA that then permitted exclusion of prominent individuals who endorse or espouse terrorist activity." *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 119-20 (2d Cir. 2009). In 2005, Prof. Ramadan sought a short-term visa to enter the

United States so as to speak at conferences, but no action was taken on his application. *Id.* at 120. Three American organizations—the American Academy of Religion, the American Association of University Professors, and PEN American Center—sued to vindicate their First Amendment rights to receive information from Mr. Ramadan.

After the district court ordered the government to issue a formal decision on the visa application, the government informed Prof. Ramadan in September 2006 that his short-term visa had been denied under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), a provision rendering inadmissible individuals who have engaged in terrorist activity by providing material support to a terrorist organization. *Id.* Specifically, the government alleged that Prof. Ramadan had knowingly supported terrorism by donating approximately $1,336 to a charity that the Treasury Department later determined was providing financial support to Hamas. *Id.* at 118, 120–21. It was undisputed that, at the time of Prof. Ramadan's donations, the Treasury Department had not designated the charity as providing funds to a proscribed terrorist organization. [8] *Id.* at 120. Accepting the government's representation that the exclusion of Prof. Ramadan was not based (or no longer based) on a determination that he had "endorse[d] or esouse[d] terrorist activity," the district court upheld the visa denial on the material support ground. *Id.* at 132.

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[8] The record also contained evidence that "at the time of Ramadan's donations, ASP was 'a verified and legitimate charity according to the Swiss Government.'" *Am. Acad. of Religion*, 573 F.3d at 122.

The Second Circuit reversed. Rejecting the State Department's argument that judicial review should be limited to whether it had merely "articulated a statutorily permissible basis" for exclusion, *see* Br. for Defendants–Appellees at 22, *Am. Acad. of Religion*, *supra* (No. 08-0826), 2008 WL 7985710 (July 11, 2008), the Second Circuit considered whether the government's construction of the security-based ground of exclusion actually comported with the requirements of the statute. The court noted that in enacting the material support provision, Congress had expressly provided that individuals who would otherwise be inadmissible should be admitted if they lacked requisite knowledge that their donations were being used to fund a terrorist organization. It also observed that Executive adherence to Congress's enactment of the lack-of-knowledge exception to the material support provision was particularly important in light of the context of Prof. Ramadan's case: the Treasury Department itself declared—when designating as a funder of Hamas the charity Prof. Ramadan had supported—that "too many innocent donors who intend for their money to be used to provide humanitarian services here or abroad, are unwittingly funding acts of violence when these funds are diverted to terrorist causes." *Am. Acad. of Religion v. Napolitano*, 573 F.3d at 133 (quotation marks omitted). Yet the record before the court provided no indication that Prof. Ramadan had been provided any opportunity to demonstrate his lack of knowledge. *See id.* The Second Circuit rejected the government's contention that it was required to acquiesce to a construction of the material support provision that would have effectively nullified the

knowledge requirement that Congress had imposed. *See id.* at 131–133.

After remand, the Secretary of State issued an order certifying that Prof. Ramadan would no longer be excluded on the basis of the material support ground that the government had previously claimed. *See* Press Release, ACLU, *State Department Ends Unconstitutional Exclusion of Blacklisted Scholars from U.S.* (Jan. 20, 2010), *available at* https://www.aclu.org/national-security/state-department-ends-unconstitutional-exclusion-blacklisted-scholars-us. Prof. Ramadan, who is now a Professor of Contemporary Islamic Studies at Oxford University, has subsequently entered the United States without incident.

In the case involving Prof. Ramadan, judicial review proved necessary to enforce congressionally imposed limits on the Executive's exclusion authority and to prevent the Executive from interfering unlawfully with U.S. citizens' right to meet with and hear from a leading foreign thinker. Judicial review proved necessary for the same reasons in other recent cases. In 2006, for example, the government without explanation revoked the visa of Adam Habib, then-Deputy Vice Chancellor of Research, Innovation and Advancement at the University of Johannesburg, a respected political analyst, and a frequent traveler to the United States. When denying a subsequent visa request in 2007, the State Department cited 8 U.S.C. § 1182(a)(3)(B)(i)(I), which renders excludable an individual who "has engaged in a terrorist activity," and provided no other explanation for the denial. *Am. Sociological Ass'n v. Chertoff*, 588 F. Supp. 2d 166, 168 (D. Mass. 2008).

U.S. citizen groups including the American Sociological Association and the American Association of University Professors, who had invited Mr. Habib to speak, brought suit to contest the visa denial. The government argued once again that no jurisdiction existed to review the security-based denial. *See id.* at 168–173. After the district court rejected this argument and denied the government's motion to dismiss the challenge, *see id.* at 174, the Secretary of State certified that Mr. Habib would no longer be excluded from the U.S. on this ground, *see* ACLU, *State Department Ends Unconstitutional Exclusion Of Blacklisted Scholars From U.S.* (Jan. 20, 2010), *available at* https://www.aclu.org/national-security/state-department-ends-unconstitutional-exclusion-blacklisted-scholars-us. Mr. Habib, who is currently the Vice-Chancellor and Principal of the University of the Witwatersrand in Johannesburg, has since been granted a visa and has entered the United States without incident.

In some cases, like those involving Prof. Ramadan and Mr. Habib, the government unlawfully excluded foreign thinkers until U.S. organizations brought suit and defeated motions to dismiss the litigation. In other cases, however, the government reconsidered exclusions after U.S. citizens merely filed suit or raised the possibility of judicial review—perhaps indicating that the government concluded that those exclusions would not withstand the limited judicial scrutiny provided for in *Mandel*. *See, e.g.*, Elizabeth Redden, *"Ideological Exclusion" Again?*, Inside Higher Ed, Oct. 28, 2013, *available at* http://shar.es/1H2v09 ("A Colombian journalist, Hollman Morris, and an Afghan women's rights activist, Malalai Joya, both received visas after the

ACLU brought attention to their cases."); Kirk Semple, *Advocate's Visa Delay Stirs Questions*, N.Y. Times, Sept. 29, 2011, *available at* http://nyti.ms/o6VAce (discussing excessive and unexplained delay in granting a visa to Kerim Yildiz, "a leading human rights advocate for the Kurdish people" who had "regularly lectured at American Universities"); Kirk Semple, *After Mysterious Delay, Mysterious Approval of Kurdish Advocate's Visa*, N.Y. Times, Oct. 3, 2011, *available at* http://nyti.ms/1x5oK6P (describing grant of visa to Mr. Yildiz following media attention drawn to his case); Melissa Lee, *Bolivian Professor Coming to UNL*, Lincoln Journal Star, July 18, 2007, *available at* http://bit.ly/14bvzN0 (describing end to years of exclusion for scholar Waskar Ari shortly after the University of Nebraska-Lincoln initiated a lawsuit seeking either adjudication of Mr. Ari's visa or an explanation for the delay).

Mandel review is crucial, in other words, not only because it allows U.S. citizens to challenge unlawful exclusions that implicate their constitutional rights, but because it reduces the likelihood that the government will unlawfully exclude invited speakers in the first place.

* * *

Thirty-seven years ago, the government claimed to this Court that if the D.C. Circuit's decision in *Abourezk* "were allowed to stand, it would not only enmesh the courts in questions outside the bounds of judicial competence, it would cast a chill over Executive decisionmaking and impair the conduct of foreign policy," forcing "unseemly inquiry

by plaintiffs and courts into the Executive's foreign affairs decisionmaking, and substantial hindrance of its conduct of foreign affairs." Pet. Br. at 36, *Reagan v. Abourezk*, 484 U.S. 1 (1987) (No. 86-656). Six years ago, the government told the Second Circuit that if it reviewed the American citizens' claims in *Am. Acad. of Religion v. Napolitano*, there would be a flood of First Amendment cases, "potentially allow[ing] judicial review of every visa denial." Br. for Defendants-Appellees at 20, *Am. Acad. of Religion*, *supra*, (No. 08-0826), 2008 WL 7985710 (July 11, 2008). Those concerns have never materialized.

In the handful of cases in which U.S. citizens have sought limited judicial review of visa denials that have affected their constitutional rights, the courts have carefully applied the *Mandel* standard to questions that lie well within the core judicial function. Far from upending the constitutional separation of powers, *Mandel* review has proven essential to safeguard Americans' rights and ensure the Executive's adherence to Congress's decisions as to which noncitizens may be excluded, and on what grounds. Without review over whether the Executive is abiding by statutory requirements, the government would be able to resume the long-discredited practice of ideological exclusions whenever it chooses. History suggests that the more significant danger is not that judicial review under *Mandel* will lead to a flood of new lawsuits, but that the absence of review will lead to unauthorized but unexamined visa denials that abridge the constitutional rights of U.S. citizens.

II. THE JUDICIARY IS COMPETENT TO EVALUATE CLAIMS IMPLICATING NATIONAL SECURITY AND FOREIGN AFFAIRS, INCLUDING IN THE VISA DENIAL CONTEXT.

The government urges that judicial review of security-based visa denials is particularly inappropriate. Pet. Br. at 46. If review is available at all in this context, the government contends, the review must be entirely conclusory: the government's mere citation of an inadmissibility provision must end the court's inquiry, because whatever precautions the federal courts may take to maintain the confidentiality of sensitive information, the risks created by judicial review are "too great to be countenanced." Pet. Br. at 52. There is no merit to this argument. To the contrary, decades of history establish beyond any doubt that the federal judiciary is competent to adjudicate the kinds of disputes at issue here.

All of the ideological exclusion cases cited above involved exclusions that were based on security grounds. In none of the cases did the courts' consideration of sensitive or classified information lead to any discernible harm to legitimate government interests. In *Abourezk*, for example, the State Department provided its reasons for denying visas on foreign policy and security grounds to the lower courts in classified declarations submitted *in camera* and *ex parte*. Both the district court and appellate court relied on the declarations in determining whether the government had complied with the statute. *See, e.g.*, 785 F.2d 1043, 1052 n.7 ("This court has also examined the reasons offered in

the *in camera* affidavits; they do not decrease our concern over the inaccuracy of the State Department's public representations "). The D.C. Circuit expressed concern about the government's overuse of classified declarations and the "entirely conclusory" public statements that had been provided to the plaintiffs. *Id.* at 1060. Nevertheless, it instructed that the plaintiffs be provided with evidence only to the extent possible "without jeopardizing legitimately raised national security interests." *Id.* When it petitioned for certiorari, the government itself determined that the declarations could be filed publicly with only minimal redactions. *See* Pet. Br. at 6 n.3, *Abourezk*, *supra* (No. 86-656) (stating that "[o]nly one paragraph and part of one sentence in one of the affidavits" remained classified).

Similarly in *Allende*, the government initially sought to rely on a wholly classified affidavit submitted *in camera* before deciding that it could submit a "partially declassified affidavit contain[ing] the same information with the exception of one sentence which was partially excised in the public document." *Allende*, 845 F.2d at 1116 n.8. The government's initial claims of secrecy in both cases proved as ultimately unnecessary as its visa denials. Throughout the litigations, however, classified information was never placed at risk through the judicial process. If anything, lower courts' experience with ideological exclusion cases serves as a caution that the government may use secrecy as a means of insulating unlawful decisions from judicial review.

The cases involving Prof. Ramdan and Mr. Habib likewise demonstrate that review of security-

based visa denials is well within the realm of judicial competence. In both cases, the government justified its conduct by invoking security-related provisions of the INA. In both cases, courts carefully evaluated whether the government had provided a legitimate reason to restrict the First Amendment rights of American citizens who sought to meet with the scholars. In neither case did the courts place classified information in jeopardy or intrude into a realm beyond judicial competence. In both cases, American citizens seeking to meet with foreign speakers were provided a forum in which they could ensure that the limitations that Congress had placed on the security-based exclusion provisions were not ignored by an Executive official acting as censor. In both cases, the State Department ultimately determined that the scholars should, in fact, be admitted.

The courts' experience outside the visa-denial context confirms the competence of the judiciary to resolve disputes touching on national security and foreign affairs. Federal courts routinely handle classified information in the context of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1805, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(B) & (b)(1), as well as in national-security prosecutions and in habeas litigation, including the litigation arising out of habeas petitions filed by prisoners held by the United States at Guantanamo Bay. In all of these contexts, district courts are required to make judgments regarding the disclosure and handling of national security information, and *in camera* review of classified materials is a standard procedure.

More broadly, this Court has expressly rejected the idea that national security matters are "too subtle and complex for judicial evaluation." *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 320 (1972); *see also, e.g.*, *Boumediene*, 553 U.S. at 796 (emphasizing judges' "expertise and competence" to address sensitive national security matters while vindicating constitutional rights). In addition, this Court has instructed that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986) (citation omitted). "Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes," and courts "cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. *See also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do."); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."). Courts regularly review matters implicating national security and foreign affairs, and they safeguard sensitive information while doing so.

Indeed, the federal courts have a diversity of tools to ensure that the government's legitimate secrets are not disseminated inappropriately. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 604 (1988) ("[T]he District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."). The tools available to judges include protective orders, closed proceedings, and *in camera* review.[9] If there are cases in which even these safeguards are insufficient to protect sensitive information, the correct response is not a blanket denial of access to the courts for U.S. citizens whose constitutional rights are at risk. Even in the

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[9] In our adversary system, *in camera*, *ex parte* review should always be a last resort. *See, e.g.*, *Weil v. Markowitz*, 829 F.2d 166, 175 (D.C. Cir. 1987) ("[T]he conduct of most judicial actions *ex parte* are generally disfavored in American jurisprudence."); *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir.1986) ("*Ex parte* communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires 'a reasonable opportunity to know the claims of the opposing party and to meet them.'" (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938))). This Court has also held, in the criminal context, that judicial proceedings in this country should be closed only when absolutely necessary and to the limited extent required to preserve an overriding need for confidentiality. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980). This Court noted that "historically both civil and criminal trials have been presumptively open," *id.* at 580 n.17, and the courts of appeal have recognized a similar right of access to civil trials, *see, e.g.*, *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (collecting cases).

extraordinary context of litigation involving state secrets, *see United States v. Reynolds*, 345 U.S. 1 (1953), courts are entirely competent to take appropriate steps once the government invokes the privilege.[10] As former federal judge, FBI Director and CIA Director William Webster testified to Congress: "I can confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege." Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearing before the S. Comm. on the Judiciary, 110th Cong. (Jan. 29, 2008) (prepared statement of William Webster).

Over the course of decades and in a wide variety of contexts, the federal courts have proven themselves entirely capable of managing litigation that involves legitimately secret information and politically sensitive topics. There is no basis to believe that the judiciary is not competent to adjudicate disputes concerning the lawfulness of exclusions that implicate U.S. citizens' constitutional rights.

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[10] The government did not assert the privilege in this case, and no cabinet-level official has put his or her name and reputation behind an affidavit swearing that the disclosure of the information at issue in this case would jeopardize national security.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

FAUZIA DIN,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE CALIFORNIA WOMEN'S LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The California Women's Law Center ("CWLC") is a non-profit, public-interest law center focused on protecting and promoting the civil rights of women and girls. Established in 1989, CWLC seeks to end violence against women and to promote reproductive justice and women's health. CWLC is committed to safeguarding civil rights for all Americans, with a particular interest in eradicating discrimination against women.

Throughout the history of the United States, women have been subject to laws that deprived them of basic civil rights, including the rights to own property, to vote, to access the courts, and to bodily autonomy. Women have greatly benefited from this Court's defense of their constitutional rights from legislative and executive overreach. This Court's decisions recognizing a constitutional right to privacy and personal choice in matters of marriage and family life have been particularly important in expanding women's personal and professional opportunities. Therefore, the CWLC has a particular interest in ensuring that this Court continues to protect those basic civil rights whenever the

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[1] In accordance with Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

executive or legislative branch asserts an absolute right to take actions that infringe upon them.

This case raises important questions regarding the scope of fundamental constitutional rights and the availability of judicial review when government action implicates those rights. If accepted by the Court, the government's position would immunize from constitutional challenge a broad range of government conduct that intrudes on women's private choices concerning marriage and family life. Accordingly, CWLC has the requisite interest and expertise to file an *amicus* brief in this case.

The sanctity of marriage and family is deeply rooted in this nation's history and tradition. The CWLC respectfully submits that the Constitution's protection of marriage and family life extends to a U.S. citizen's right to build her marital home and family in the United States. Therefore, where the denial of a visa to a U.S. citizen's spouse prevents the citizen from doing so, she is entitled to limited judicial review of that denial.

SUMMARY OF THE ARGUMENT

Marriage "creat[es] the most important relation in life" and has "more to do with the morals and civilization of a people than any other institution." *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888). For this reason, "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause ." *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639–40 (1974). This well-established freedom is the foundation of many cherished liberties, including the choice of whom to

marry, *Loving* v. *Virginia*, 388 U.S. 1 (1967), whether and when to start a family, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and how to raise children, *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925).

The Constitution's protection of marriage and family life encompasses a U.S. citizen's choice to build her marital home in the United States. *See Moore* v. *City of E. Cleveland*, 431 U.S. 494 (1977). Living together is, and always has been, an integral element of the marital relationship in America. And, as the Court has consistently held, the Due Process Clause protects not only the right to marry, but also the right to "establish a home and bring up children. " *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *see also Griswold* v. *Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring) (describing the right to marry and "establish a home" as one of the "basic civil rights of man").

A U.S. citizen's liberty interest in marriage and family life is no less fundamental when it involves immigrant families. *See Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977); *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978). Congress has made family unity a central goal of our immigration laws: A U.S. citizen may petition the government for a visa for her non-citizen spouse, and Congress has accorded such petitions a "most favored" position under our immigration laws. *See Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (noting that "immediate relatives" of U.S. citizens are "most favored" under U.S. immigration laws).

The question in this case is whether and to what extent a U.S. citizen may seek judicial review when a consular official denies a visa to the citizen's spouse, thereby preventing the couple from building a home and family in the United States. This Court's decision in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), answers that question. In *Mandel*, the Court held that a U.S. citizen is entitled to limited judicial review of a visa denial where the denial implicates the citizen's constitutional rights. *Id.* at 769–70; *Fiallo*, 430 U.S. at 795 & n.6. This holding recognizes that some form of judicial review is necessary whenever government action infringes on citizens' fundamental constitutional rights. *See, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

In denying a visa to the spouse of a U.S. citizen, the consular official significantly burdens the citizen's fundamental liberty interest in marriage and family life. Therefore, courts must ensure that, at minimum, "the Executive exercise[d] [its] power on the basis of a facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 770. This limited judicial review provides essential protection against arbitrary and discriminatory exercise of the Executive's authority to exclude non-citizens in violation of U.S. citizens' constitutional rights. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

ARGUMENT

I. THE DENIAL OF A VISA TO THE SPOUSE OF A U.S. CITIZEN IMPLICATES THE CITIZEN'S LIBERTY INTEREST IN MARRIAGE AND FAMILY LIFE

A. The Sanctity Of Marriage And Family Is Deeply Rooted In This Nation's History And Tradition

1. Over the centuries, scholars, political leaders, and this Court alike have celebrated the tradition of married couples sharing a home together as the backbone of American society. In 1856, Alexis de Tocqueville remarked, "[t]here is certainly no country in the world where the tie of marriage is so much respected as in America, or where conjugal happiness is more highly or worthily appreciated. [T]he American derives from his own home that love of order which he afterwards carries with him into public affairs." Alexis de Tocqueville, 1 *Democracy in America* 335 (Henry Reeve trans., 1856).

As de Tocqueville observed, marriage has played an integral role in shaping American society. *See Moore* v. *City of E. Cleveland*, 431 U.S. 494, 511 (1977) (Brennan, J., concurring) ("[T]he role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution." (internal quotation marks omitted)); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888). Not only was marriage essential to the individual happiness of early colonists, but it also served "as a training

ground of citizenly virtue," providing a counterpoint to the "individualistic foundation of social contract thinking." Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 16–18 (2000).

Respect for marriage was so great that early political writings drew inspiration from the marital relationship as a metaphor for the fledgling democratic union. *See id.* at 16 ("The suitability of the marital metaphor for political union drew tremendous public attention to marriage itself in the Revolutionary era."). "[A]s a voluntary union based on consent, marriage paralleled the new government. This thinking propelled the analogy between the two forms of consensual union into the republican nation's self-understanding and identity." *Id.* at 10.

In establishing a new government, our Founding Fathers sought to protect from unwarranted government intrusion "certain unalienable Rights," including "Life, Liberty and the pursuit of Happiness." *The Declaration of Independence* para. 2 (U.S. 1776). Their concept of liberty and happiness unquestionably reflected the integral role that the marital relationship played in American society. The married couple's "unity" was the "most important" aspect of marriage for "Revolutionary-era Americans," and cohabitation was one of the most basic hallmarks of marriage. Cott, *Public Vows*, at 10. Based on this cherished tradition, our founders recognized that "[b]y a law of our nature we cannot be happy without the endearing connections of a family." Letter from President Thomas Jefferson to William Clarke (Sept. 10, 1809); *see also* Letter from President John Adams to Abigail Adams (March 28,

1783) ("I cannot bear the Thought of living longer Seperate from [my family]").

In recognizing the importance of family life, the founding generation acknowledged "a right of privacy older than the Bill of Rights." *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). Since Biblical times, married couples have left their childhood homes to "be joined" joyfully with one another as "one flesh." *See Ephesians* 5:31 (King James); *Ecclesiastes* 9:9 (King James). For at least eight centuries, Western literature has likewise celebrated the marital home. *See* The Odyssey of Homer, Book VI, p. 75 (approximately 700 B.C.) (Samuel Butler trans., 2009) ("[T]here is nothing better in this world than that man and wife should be of one mind in a house. It discomfits their enemies, makes the hearts of their friends glad, and they themselves know more about it than anyone.").

Cohabitation has remained essential to the marital relationship, and married couples continue to choose to build their homes together. In 2014, Census survey data showed that only 2.8% of married couples who were not separated due to marital discord lived separately from each other. *See* U.S. Census Bureau, *Census Data on Marital Status*, *available at* http://www.census.gov/cps/data/cpstablecreator.html.

In short, marriage, at its core, is and always has been about two people building a life and a home together.

2. The history of state regulation of marriage respects and follows this tradition. Under common law, marriage legally merged the spouses' identities,

making them "one person in law." 1 William Blackstone, *Commentaries* 430. Based on this "theoretic identity of person and of interest between husband and wife," early American laws "presume[d] that, from the nature of [the marriage] relation, the home of the one [wa]s that of the other." 2 Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce* § 730 (1st ed. 1852) (quoting Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court); *see also id.* § 553 n.3 (discussing a 1689 case in which a county court ordered a husband to "take home with him his said wife , to dwell with him as man and wife ought to do").

Although modern American law now recognizes the equality and individuality of spouses, cohabitation remains a central feature of the legal recognition of marriage. For example, several States allow couples to attain marital status merely by cohabitating with that intent. *See, e.g.*, Tex. Fam. Code Ann. §§ 1.1001, 2.401(2) (West 2013); *People* v. *Lucero*, 747 P.2d 660, 663 (Colo. 1987); *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979). On the other hand, "absence from the marital abode" or withdrawal "from the matrimonial domicile" may constitute a fault ground for divorce. *See, e.g.*, *Eichmann* v. *Eichmann*, 465 A.2d 1248, 1249–50 (Pa. Super. Ct. 1983); *Langton* v. *Langton*, 442 So. 2d 1308, 1309 (La. Ct. App. 1983); *see also* 1 Blackstone, *Commentaries* 428 (noting that divorce occurred when it became "improper or impossible for the parties to live together"). State law also recognizes that individuals suffer a unique harm when tortious conduct causes them the "loss or

impairment of the other spouse's society, companionship, affection and sexual relations," allowing them to recover damages for the loss of consortium. Restatement (Second) of Torts § 693 cmt. f (1977).

These values resonate in our immigration laws, which have long promoted U.S. citizens' strong interests in residing in the United States with their non-citizen spouses. Indeed, "family unification [is] the cornerstone of American immigration law and policy." 136 Cong. Rec. H12358-03 (daily ed. Oct. 27, 1990) ("American immigration law should be based upon a desire for pursuing the time-honored American tradition of encouraging family unity. "); H.R. Rep. No. 101-723 (1990) ("Currently, U.S. immigration policy is based primarily on the humanitarian principles of family reunification and refugee resettlement." (internal citation omitted)); S. Rep. No. 82-1137, at 16 (1952) (noting "the well-established policy of maintaining the family unit wherever possible" in the immigration context). This has been true since Congress began regulating immigration more than a century ago. *See, e.g.*, Act of March 3, 1903, Pub. L. No. 162, §§ 2, 37, 32 Stat. 1213, 1214, 1221 (excluding from entry certain "classes of aliens," including "persons afflicted with a loathsome or with a dangerous contagious disease," but creating a limited exception for the wife or minor children of a U.S. citizen or permanent resident); Act of Feb. 5, 1917, Pub. L. No. 301, § 22, 39 Stat. 874, 877 (expanding this exception and granting additional benefits for the wife and minor children of a naturalized U.S. citizen); Act of May 26, 1924, Pub. L. No. 139, § 4(a), 43 Stat. 153, 155 (exempting

citizens' wives and unmarried children from numerical quotas on immigration to the United States); Act of July 11, 1932, Pub. L. No. 277, § 1(a), 471 Stat. 656, 656 (expanding the definition of a non-quota immigrant to include the alien husbands of U.S. citizens).[2]

B. The Right To Marry, Which Includes Establishing A Home And Raising A Family, Is Fundamental

This Court's "decisions establish that the Constitution protects the sanctity of [marriage and family] precisely because the[se] institution[s] [are] deeply rooted in this Nation's history and tradition." *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977). The Court has held on more than a dozen occasions that marriage is a fundamental right guaranteed by due process, declaring that

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[2] Modern immigration laws continue to prioritize family unity. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (exempting "immediate relatives," including children and spouses, of U.S. citizens from numerical quotas); *id.* §§ 1151(a)(1), 1153(a) (providing preferences for family sponsored immigrants); *id.* § 1229b(b)(1)(D) (providing for cancellation of removal of an alien who is inadmissible or deportable if the removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child"). Notably, Congress, with few exceptions, has granted the right to seek a visa for a non-citizen spouse or child "only to the citizen." *Fiallo* v. *Bell*, 430 U.S. 787, 806 (1977) (Marshall, J., dissenting); *id.* at 807 ("The essential fact here is that Congress did choose to extend such privileges to American citizens . . . "). *See also* 8 U.S.C. § 1154(a) (requiring the U.S. citizen to petition the Attorney General to classify an alien as an immediate relative so that the alien may obtain a visa).

"[m]arriage is one of the 'basic civil rights of man.'" *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)); *Lawrence* v. *Texas*, 539 U.S. 558, 574 (2003); *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992); *Turner* v. *Safley*, 482 U.S. 78, 95–96 (1987); *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978); *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Moore*, 431 U.S. at 499; *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639 (1974); *Roe* v. *Wade*, 410 U.S. 113, 52 (1973); *Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965); *Skinner*, 316 U.S. at 541; *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Although marriage "has always been subject to the control of the legislature," *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888), this Court has reaffirmed time and again that "[c]hoices about marriage, family life, and the upbringing of children are sheltered by the [Due Process Clause] against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.*, 519 U.S. at 116.[3]

Any meaningful protection of marriage—as our history demonstrates and this Court has emphasized—must encompass the couples' right to

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[3] Federal action is similarly constrained by the Due Process Clause of the Fifth Amendment. *See United States* v. *Windsor*, 133 S. Ct. 2675, 2692, 2695 (2013); *cf. Bolling* v. *Sharpe*, 347 U.S. 497, 499–50 (1954) (recognizing that the Fourteenth Amendment's Equal Protection Clause applies to the federal government through the Fifth Amendment).

"establish a home [together] and bring up children." *Meyer*, 262 U.S. at 399; *see also Griswold*, 381 U.S. at 502 (White, J., concurring). Marriage, after all, "is more than a routine classification for purposes of certain statutory benefits." *United States* v. *Windsor*, 133 S. Ct. 2675, 2692 (2013). It is a "way of life intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. And a married couple's ability to live together—like the ability to engage in private, protected sexual activity—is an essential part of this intimate relationship. *See id.* at 485. For this reason, this Court has held that a citizen's liberty interest in marriage and family is infringed "when the government intrudes on choices concerning family living arrangements." *Moore*, 431 U.S. at 499 (striking down a local ordinance limiting occupancy of a dwelling to a single family and defining "family" so that it did not include a grandmother, her son, and two grandsons); *see also Loving*, 388 U.S. at 4 (striking down a state law prohibiting "any white person and colored person" from "cohabiting as man and wife").

C. The Right To Marry Is Implicated When The Government Denies A Visa To A U.S. Citizen's Spouse, Thereby Preventing The Couple From Living Together In The United States

1. Denying a visa to a U.S. citizen's spouse necessarily infringes her liberty interest in marriage by preventing her from building a family in the United States. The Court has already recognized that a father's "fundamental constitutional interest[ ] in a familial relationship" is implicated by

immigration laws that "make[ ] it more difficult for illegitimate children and their natural fathers to be reunited in this country." *Fiallo* v. *Bell*, 430 U.S. 787, 794, 795 n.6, 798 (1977). Similarly, the fundamental interest in marriage and family is implicated when a U.S. citizen seeks to live in this country with his or her non-citizen spouse.

The government's attempt to redefine the interest in question as "having one's alien spouse enter and reside in the United States," Pet. Br. 25, "fail[s] to appreciate the extent of the liberty at stake." *Lawrence* v. *Texas*, 539 U.S. 558, 567 (2003). As it has consistently done in the past, this Court should reject this effort to narrowly redefine the constitutional liberty interest in marriage and family. *See Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and), solid recognition of the basic values that underlie our society.'" (citation omitted)).

In *Lawrence*, for example, this Court expressly declined to frame the issue presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." 539 U.S. at 566 (internal quotation marks omitted). The Court instead identified the relevant liberty interest as the right to make "personal decisions relating to marriage, procreation, contraception, family relationships, and education . . . " *Id.* at 574. *See also id.* at 572 ("liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

Similarly, in *Loving*, this Court analyzed whether Virginia's laws criminalizing interracial marriage infringed on the Lovings' general "freedom to marry," rather than defining the liberty interest at stake as the right to marry a person of a different race. *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *see also* William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 101 Yale L.J. 1495, 1509 (1994) ("The Lovings claimed the right to marry, pure and simple. But what if the Court had interpreted this as a claim to a 'right to mixed-race marriage' The result could not have been the same.").

The same fundamental interests are implicated here, and are in no way diminished because a U.S. citizen has an immigrant family. *See Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for *all individuals*." (emphasis added)); *cf. Kleindienst* v. *Mandel*, 408 U.S. 753, 764–65 (1972) (holding that the First Amendment protects the right to receive information from a non-citizen speaker); *Lamont* v. *Postmaster Gen.*, 381 U.S. 301, 302 (1965) (striking down a law burdening a citizens' right to access information from materials "prepared in a foreign country").

2. The government's cramped definition of the liberty interest at stake would hold that these "recognized rights are not implicated" here because the denial of the visa "d[oes] not nullify the marriage, or deprive respondent of the legal benefits the marriage created or prevent her from living with her spouse anywhere in the world besides the United States." Pet. Br. 22–23. By the government's lights,

the meaning of marriage would be reduced to a piece of paper devoid of the companionship and physical unity that make marriage an intimate "way of life." *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). This Court has never defined the scope of constitutional protection for marriage so narrowly.[4]

It is beyond dispute that government action need not "nullify" a marriage to implicate a citizen's liberty interest in marriage and family life. This Court has struck down, time and again, as a direct burden on the right to marriage, state action that intrudes too far into the sacred confines of the marital relationship. In *Cleveland Board of Education*, for example, this Court struck down "restrictive maternity leave regulations" as too "heavy [a] burden on the exercise" of individuals' "freedom of personal choice in matters of marriage and family life" even though the regulations did not prevent individuals from marrying or having children. *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639 (1974). Similarly, in *Griswold*, this Court invalidated a law forbidding the giving of "information, instruction, and medical advice to

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[4] The government's argument here that a visa denial to a non-citizen family member does not "impose[ ] a direct restraint on [a U.S. citizen's] liberty" interests, Pet. Br. 32, is reminiscent of its position in *Mandel* that a visa denial "involves no restriction on First Amendment rights at all since what is restricted is 'only action—the action of the alien in coming into this country,'" 408 U.S. at 764. This Court rejected that argument, finding that it could not "realistically say that the problem . . . is nonexistent because the mode of regulation bears directly on physical movement." *Id.*

married persons as to the means of preventing conception" because the law had an impermissibly "destructive impact" on "the marriage relationship." *Griswold*, 381 U.S. at 480, 485–86 (emphasis in original); *see also Turner* v. *Safley*, 482 U.S. 78, 99 (1987) (holding that a state regulation prohibiting prisoners from marrying without the prison superintendent's permission impermissibly burdened the constitutional right to marry); *Boddie* v. *Connecticut*, 401 U.S. 371, 374, 383 (1971) ("prohibit[ing] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages" because it violated their Due Process right to adjust this "fundamental human relationship").[5]

Preventing a married couple from living together in the United States is a far more intrusive restriction than those invalidated in these cases.

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[5] This Court has struck down laws that impermissibly burden, but fall short of nullifying, other constitutional rights. *See, e.g.*, *District of Columbia* v. *Heller*, 554 U.S. 570, 630 (2008) (striking down a "requirement . that firearms in the home be rendered and kept inoperable at all times" because it "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense"); *Lamont* v. *Postmaster Gen.*, 381 U.S. 301, 305 (1965) (striking down a statute requiring the post office to destroy mail deemed communist propaganda absent an affirmative request from the addressee as an unconstitutional burden on the right to receive publications under the First Amendment); *Harman* v. *Forssenius*, 380 U.S. 528, 541 (1965) (striking down a Virginia law requiring voters in federal elections to pay a poll tax or file a certificate of residence because it "unquestionably erect[ed] a real obstacle to voting in federal elections").

Indeed, it strikes at the very core of what it means to be married. *See Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse. It is an association that promotes a way of life [and] a harmony in living ").

The liberty to have and raise children together, to engage in private sexual activity, and to have one another's companionship and support would be rendered meaningless by government action that prohibits the couple from living together. The government's assertion that Respondent may "liv[e] with her spouse anywhere in the world," Pet. Br. 22, is cold comfort. In fact, this Court rejected precisely this argument in *Loving* v. *Virginia*. Mildred Jeter and Richard Loving were lawfully married in the District of Columbia before seeking to "establish[ ] their marital abode" in Virginia. 388 U.S. at 2–3. Their subsequent conviction for violating Virginia's ban on interracial marriage did not nullify their marriage; and their suspended sentence, which required them to "leave the State and not return to Virginia together for 25 years," did not prevent them from residing in any one of the 34 states where interracial marriage was lawful. *Id.* at 3. Yet this Court held that Virginia's anti-miscegenation statute "deprive[d] the Lovings of liberty without due process of law" because the law restricted their "freedom to marry." *Id.* at 12. *See also Moore*, 431 U.S. at 499, 550 (plurality opinion and White, J., dissenting) (striking down East Cleveland's ordinance regulating family living arrangements despite the fact that the family was "free" to live together "in other parts of the Cleveland metropolitan area").

Likewise, that a couple could theoretically live outside the United States does not extinguish a U.S. citizen's liberty interest in establishing her marital home in the United States. *See Mandel*, 408 U.S. at 765 (declining to hold that the "existence of other alternatives extinguishes altogether any constitutional interest in this particular form of access"). *Cf. Jones* v. *Helms*, 452 U.S. 412, 417–18 (1981) ("It is, of course, well settled that the right of a United States citizen to take up residence in the State of his choice is protected by the Federal Constitution."); *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (finding that stripping a citizen of his fundamental right of citizenship at home, and forcing him to face the uncertainty of finding it abroad, was "a form of punishment more primitive than torture").

II. A U.S. Citizen Is Entitled to Limited Judicial Review of the Denial of a Visa to His or Her Non-Citizen Spouse

The Due Process Clause of the Fifth Amendment prohibits the government from depriving a U.S. citizen of her liberty interests "without due process of law." U.S. Const. amend. V; *see also, e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). As discussed above, a U.S. citizen's liberty interest in marriage encompasses her right to establish a home with her non-citizen spouse. *See supra* Part I.B–C. In *Mandel*, this Court recognized that where a denial of a visa to a non-citizen implicates the fundamental rights of a U.S. citizen, the citizen may seek limited judicial review to ensure that "the Executive exercise[d] [its] power on the basis of a facially legitimate and bona fide reason." *Kleindienst* v. *Mandel*, 408 U.S. 753, 769–70 (1972). Likewise, a

U.S. citizen may seek review of a visa denial where it infringes her liberty interest in marriage and family. *See Fiallo* v. *Bell*, 430 U.S. 787, 795 (1977) (applying the same standard where a U.S. citizen challenged immigration laws that implicated the fundamental constitutional interests in a familial relationship).

1. Judicial review is the primary constitutional check on Executive power, and it is essential where government action burdens the exercise of a citizen's civil rights. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."); *Trop* v. *Dulles*, 356 U.S. 86, 103–04 (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. If we do not, the words of the Constitution become little more than good advice."). *See also* The Federalist No. 78 (Alexander Hamilton) (explaining that judicial review is necessary "to guard the Constitution and the rights of individuals," and noting that, without judicial review, "all the reservations of particular rights or privileges [in the Constitution] would amount to nothing"). There can be no doubt that government action that prevents a U.S. citizen from establishing her marital home in the United States warrants such review.

Contrary to the government's assertions, *see* Pet. Br. 28, Congress's plenary power "to make policies and rules for exclusion of aliens" does not immunize these rules from judicial review where they implicate the fundamental constitutional rights of U.S. citizens. *See Mandel*, 408 U.S. at 769–70; *Fiallo*, 430

U.S. at 793 n.5 ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens "). "[T]ension often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 528 (2004) (plurality opinion). Importantly, however, the strength of the government's regulatory interest cannot "remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934) (Olsen, J., concurring) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."). Rather, in "determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const. [amend.] 5," courts ordinarily balance "'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 528–29 (quoting *Mathews*, 424 U.S. at 335 (1976)).

This Court did just that in *Mandel* and determined that, in light of Congress's traditionally strong authority over immigration policy, U.S. citizens could seek only limited judicial review of a visa denial that implicated the citizens' constitutional rights. 408 U.S. at 770. Under this

limited review, "the courts neither look behind the exercise of th[e government's] discretion, nor test it by balancing its justification against the [constitutional] interests of those who seek [the admission of] the applicant." *Id.* They merely ensure that the denial of a visa that implicates the constitutional rights of U.S. citizens is based, at a minimum, on a "facially legitimate and bona fide reason." *Id.*; *Fiallo*, 430 U.S. at 795 n.6.

This minimal review is critical: It is the only check against arbitrary deprivation of the U.S. citizen's fundamental liberty interests because the non-citizen spouse has no right to review of his visa denial. By contrast, where a U.S. citizen is separated from her spouse because of the spouse's deportation or incarceration, ample checks exist to ensure that such decisions are not made arbitrarily. *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Jones* v. *United States*, 463 U.S. 354, 361 (1983) ("commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" (citation omitted)).

2. The government argues that subjecting visa denials to this limited review would lead to a flood of claims "asserted by U.S.-citizen children, parents, or even siblings whose alien family members have been deemed inadmissible to or removed from the United States." Pet. Br. 31. But fear that courts may be called upon to safeguard U.S. citizens' constitutional interests cannot justify closing the courthouse doors.

Cf. Gitlow v. *New York*, 268 U.S. 652, 666 (1925) (finding that the Constitution protects citizens' fundamental right to free speech from infringement by state governments, even though, in so holding, it opened the courts to petitioners whose rights were being violated by state governments).

In any event, the government's fears are unfounded. *Mandel* provides the roadmap, and affording limited judicial review under its framework will do nothing more than ensure that the government provides a *facially* legitimate and bona fide reason for visa denials that implicate U.S. citizens' rights. Several circuits already allow for this type of review, and the floodgates have held. *See, e.g.*, *Am. Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 124–25 (2d Cir. 2009) (allowing a First Amendment challenge to the denial of a visa); *Adams* v. *Baker*, 909 F.2d 643, 647 & n.3 (1st Cir. 1990) (same); *Abourezk* v. *Reagan*, 785 F.2d 1043, 1050–51 & n.6 (D.C. Cir. 1986) (same).

As *Mandel* implicitly recognized, this limited judicial review is necessary to preserve the fundamental rights of U.S. citizens. Otherwise, U.S. citizens would be left with no recourse against arbitrary or invidious exercise of a consular official's delegated authority to exclude non-citizens in violation of citizens' constitutional rights. Indeed, the courts would be powerless to stop a consular official from denying visas based on nothing more than personal prejudice. A consular official could decide, for example, that no interracial, gay, or lesbian couples will receive a visa. The immigration laws—and our Constitution—plainly do not countenance such action. *See Loving* v. *Virginia*, 388

U.S. 1 (1967); *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). Such a concentration of power in one branch of government is antithetical to our system of checks and balances, under which there is "a role for all three branches when individual liberties are at stake." *See Hamdi*, 542 U.S. at 536 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that this Court should affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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JOHN F. KERRY, SECRETARY OF STATE, *ET AL.*,

Petitioners,

v.

FAUZIA DIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER CONSULAR OFFICERS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

As former consular officers with decades of experience working for the Department of State, *Amici* Bushra A. Malik, Robert A. Mautino, Stephen R. Pattison, William R. Rosner, Peter van Buren, and Micah Watson have extensive expertise in visa application processing and in exercising discretion to fulfill that task.[1] Aside from work at Foggy Bottom headquarters in Washington, D.C., *Amici*'s postings abroad include Accra, Ghana; Bangkok, Thailand; Beirut, Lebanon; Berlin, Germany; Brussels, Belgium; Bucharest, Romania; Colombo, Sri Lanka; Guadalajara, Mexico; Helsinki, Finland; Hong Kong, People's Republic of China; London, United Kingdom; Osaka, Japan; Rotterdam, The Netherlands; Seoul, South Korea; Taipei, Taiwan; Tijuana, Mexico; and Tokyo, Japan.

Consular officers are defined in relevant part by the Immigration and Nationality Act as "any consular, diplomatic, or other officer or employee of the United States designated for the purpose of issuing immigrant or nonimmigrant visas." 8 U.S.C. § 1101(a)(9). During their public service, *Amici* were collectively responsible for assessing tens of thousands

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

of visa applications, as line consular officers and in supervisory capacities. Now, as then, they are interested in maximizing the accuracy and fairness of weighty decisions about whom to admit to the United States, particularly when U.S. citizens' family reunification is at stake. They submit this brief to clarify the role that consular officers and other government actors play in the current visa-security system when evaluating visa applications that may implicate national security.

SUMMARY OF ARGUMENT

Certain visa application denials, particularly those based on information originating from agencies other than the Department of State, can be qualitatively different from denials based on consular discretion. Although the end result looks the same – "Visa Denied" – denials based on database and watchlist information maintained in the United States by the Department of Homeland Security, the FBI, and other agencies, bear little resemblance to the traditional exercise of consular discretion because the specific information which requires the consular officer to deny these visas is usually not available for him or her to evaluate. Real decision-making in these cases has in effect been ceded to the database and watchlisting process, in which government agents other than consular officers affix a label (*e.g.*, "known or suspected terrorist") that is then used as a proxy for consular judgment.

As a consequence, visa denials that rely on database and watchlist information frequently involve no consular discretion and are compelled by conclusory statements for which the underlying basis is unseen and unevaluated by a consular officer. Actions taken by the consular officer who adjudicated Mr. Berashk's visa provide a good example of this paradox, as the consular officer's initial prediction of the visa's speedy approval was made without awareness of what appears to be derogatory information about Mr. Berashk contained in a database. Consuls do not run mandatory name-checks on applicants until after their visa interviews are completed and an applicant is found to be eligible, otherwise, for visa issuance. The discovery of derogatory information against Mr. Berashk appears to have arisen from a database, not from the visa interview. Shielding the denial of his visa from judicial review, would, therefore, erroneously cloak database and watchlist entries in the garb of consular discretion.

Judicial review should be available for visa applications denied on grounds extending beyond consular discretion, with appropriate restrictions to prevent release of classified information. Judicial review is especially appropriate when a U.S. citizen's family unity is at stake.

ARGUMENT

I. Petitioners' description of consular visa processing must be supplemented to reflect the changed nature of modern visa security, which requires visa denials based on database and watchlist "hits" without genuine consular evaluation.

Petitioners' brief presents an anachronistic picture of consular visa processing, arguing against "revisiting decisions about whether aliens who appear before consular officers at *far-off posts* satisfy the conditions Congress has decreed." Petitioners' Brief, 15 (emphasis added); *see also id.* at 34 (opposing "judicial second-guessing of decisions *made by consular officers abroad*") (emphasis added), 40 (describing Congress "vest[ing] consular officers with the authority to make *final determinations*" about admission (emphasis added)). This role description, while extremely familiar to *Amici* – capturing, for example, how they routinely evaluated particular categories of visa applicants for impermissible "immigrant intent" under 8 U.S.C. § 1184(b) – fails to acknowledge that many visa denials no longer result from the exercise of consular discretion as traditionally envisioned. Instead, many visa denials occur because officials at other agencies make judgments based on information available exclusively to them, which consular officers – who themselves had no investigative role or authority to challenge that evidence – are unable to contest.

As a description of today's system of visa application processing after the Homeland Security Act of

2002, the traditional picture is outdated because it omits the broad power of actors outside the Department of State's consular corps to control the outcome of visa applications. Point II below describes in detail the database infrastructure underpinning current visa security. Before reaching those particulars, this section addresses the statutory framework that altered how responsibilities for visa decision-making are divided between the Department of State (DOS) and the Department of Homeland Security (DHS).

Prior to the Homeland Security Act, consular officers were the lead actors in visa adjudication. *See* Stephen R. Viña, Cong. Research Serv., RL31997, *Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues* 1 n.2 (2003) ("The Secretary of State, the State Department, and the diplomatic and consular officers therein had primary authority for interpreting and implementing [INA] provisions on issuing visas overseas, as well as having a role in implementing certain provisions that implicated sensitive foreign policy concerns."). Under the new statutory regime, however, "all authorities to administer, and enforce the provisions of [the Immigration and Nationality] Act and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas" are now "vested exclusively" with the Secretary of Homeland Security, 6 U.S.C. § 236(b)(1). The Secretary of State's residual role has been preserved only for individual visa

"refusal[s] necessary or advisable in the foreign policy or security interests of the United States," 6 U.S.C. § 236(c)(1), as well as for particular foreign policy provisions of the INA. *See* 6 U.S.C. § 236(c)(2) (retaining Secretary of State's extant authorities, *e.g.*, determinations under 8 U.S.C. § 1182(a)(3)(C)(i) that an applicant's admission poses "potentially serious adverse foreign policy consequences for the United States").[2]

Ultimate authority to control the vast majority of visa denials therefore no longer rests with consular officers, who are employees of the Department of State. Rather, it is the Secretary of Homeland Security who is vested with the broad "authority to refuse visas in accordance with law." 6 U.S.C. § 236(b)(1). DHS's authority to deny a visa "is exercised through the Secretary of State," *id.*, and in practice through consular officers at posts abroad, but an applicant's visa denial often has little or nothing to do with the discretion conferred on consular officers by Congress.

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[2] For further elaboration of the post-Homeland Security Act division of authorities, see National Immigration Project of the National Lawyers Guild, *Statutes Related to Visa Eligibility* (Jan. 6, 2015), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Visa_Statutes_Chart.pdf; and National Immigration Project of the National Lawyers Guild, *Visa-Related Activity Chart* (Jan. 6, 2015), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Visa-Related_Activity_Chart.pdf.

In order to implement their dual responsibilities, DOS and DHS signed a memorandum of understanding (MOU) in 2003. *See Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002* 11 (Sept. 28, 2003), *available at* http://www.law.yale.edu/documents/pdf/News_&_Events/ADOS_DHS_MOU_re_HSA.pdf; Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies* 17-18 (2014). The MOU clarifies that "the Secretary of Homeland Security's authority to direct refusal or revocation of a visa may be delegated only to DHS headquarters staff," adding that "[i]f the Secretary of Homeland Security decides to refuse a visa [he or she] shall request the Secretary of State to instruct the relevant consular officer to refuse the visa." MOU, *supra*, at 8.

The MOU underpins today's changed nature of visa-application processing by, *inter alia*, implementing the Homeland Security Act's provision for assigning DHS personnel to diplomatic posts. *See* Homeland Security Act of 2002, P.L. 107-296, § 428(e), 116 Stat. 2135, 2189-90. Today, there are 20 DHS Visa Security Units (VSUs) abroad. *See* Dep't of Homeland Security, Office of Inspector General, *The DHS Visa Security Program* 3 (2014). One of these VSUs is in Islamabad, Pakistan, where Mr. Berashk was interviewed and told to expect his visa in two to six weeks. *See* Wasem, *supra*, at 13. DHS intends to expand its U.S.-based Pre-Adjudicated Threat Recognition and Intelligence Operations Team (PATRIOT), which "currently

screens visa applicants from the 20 VSU posts . . to screen applications for all 225 visa-issuing posts." DHS Visa Security, *supra*, at 8, 26. The very name of this DHS unit – dedicated to "pre-adjudicated" threats – reveals the shift away from traditional consular decision-making that the new statutory regime accomplished.

DHS describes VSU staff as "perform[ing] visa security activities, which aim to complement the DOS visa screening process with law enforcement resources *not available to consular officers*." Wasem, *supra*, at 13 (emphasis added). VSU personnel are authorized, "as deemed appropriate by the Secretary of Homeland Security, [to] provide the rating and/or reviewing officer with input relevant to the evaluation of a consular officer [for mandatory] consideration in preparing the annual employee evaluation report." MOU, *supra*, at 13.

The MOU anticipated disagreements between DOS and DHS officials regarding visa denials:

> A DHS employee assigned to an overseas post and performing section 428(e) [visa security] functions may recommend to the chief of the consular section or the most senior supervisory consular officer present that a visa be refused or revoked. If the chief of section or supervisory consular officer does not agree that the visa should be refused or revoked, the post will initiate a request for a security or other advisory opinion [SAO] and the DHS

> employee will be consulted in its preparation.

MOU, *supra*, at 11; *cf.* U.S. Gov't Accountability Office, GAO-11-315, *DHS's Visa Security Program* [VSP] *Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide* 15 (2011) ("VSP and consular interaction has been difficult at some posts, and ICE [Immigration and Customs Enforcement] has provided limited guidance for such interaction."). *Amici* were keenly aware during their service that questioning the national-security basis provided by other agencies for visa denials would not be well received either by those agencies or their own superiors in the Department of State.

The process described in the MOU requires consular officers to refer "selected visa cases for greater review by intelligence and law enforcement agencies." Wasem, *supra*, at 10. These Security Advisory Opinions (SAOs) place further constraints on consular decision-making, involving the FBI and other counterterrorism agencies, as described below. The MOU provides that "[c]ases in which a third agency to which such an SAO request is referred believes that denial of a visa is appropriate and DOS believes the information is legally insufficient will be *referred to the Secretary of Homeland Security to decide* whether the facts support denial of the visa in accordance with law." MOU, *supra*, at 7 (emphasis added). In such cases, whatever discretion the consular officer might wish to exercise is countermanded, and the officer ultimately issues a decision

that may not be based on his or her independent judgment. Consular officers are not law enforcement officials or equipped to investigate and evaluate all adverse data that may be included in databases or watchlists by other agencies. Consuls do, however, on occasion encounter cases where the rationale for a security-based denial does not seem rational or persuasive.

In short, only by omitting the new reality of visa decision-making can Petitioners assert that judicial review in cases like this one challenges whether "the *consular officer* reached an erroneous decision," Petitioners' Brief, 53 (emphasis added). In fact, that decision often is the product of information the consular officer has never seen, much less exercised discretion in evaluating, as the next section illustrates through a real-life example. When evaluating judicial reviewability in terms of "the exercise of the consular officer's responsibilities," *id.*, therefore, the Court is faced with a much more diffuse set of information inputs – and final authority reassigned by the Homeland Security Act to DHS – than the traditional picture of consular visa processing Petitioners convey.

II. Judicial review is a necessary safety-valve for visa denials relying on databases and watchlists that are compiled with variable reliability by multiple agencies, several of which have no authority over visa decisions.

Computers have revolutionized how information is stored and used. This now-obvious point obscures a subtler shift worked by the information revolution. Decisions once made by consular officers "at far-off posts," Petitioners' Brief, 15, based on their independent evaluation and judgment, now increasingly rely on databases and watchlists maintained by distant officials based in the United States. The underlying standards used to compile these lists frequently remain unknown to the end-user, who nonetheless relies on their imposed labels. When a consular officer abroad denies a visa because the applicant's name appears in a watchlist curated in Washington, D.C. by DHS, the FBI, or a third agency, such watchlist "hits" substitute for independent consular decision-making. Even databases run by the State Department are infused with information vetted (and labeled with threat designations) by outside officials neither trained nor authorized to make visa decisions.

The perception among consular officers like *Amici* is that serious questioning by a consul of national-security-based visa-denial information provided by another agency is essentially futile. Indeed, the State Department instructs that where a

DHS-generated basis for inadmissibility is discovered in the Consular Lookout and Support System (CLASS), the consular officer "must assume that the finding was correct" and, except in cases involving nonpermanent ineligibilities, "should not look behind a definitive DHS finding or re-adjudicate the alien's eligibility with respect to the provision." U.S. Dep't of State Cable, 05-State-066722, *Processing Cases with CLASS Hits* ¶¶7-8 (Apr. 12, 2005), published on AILA InfoNet at Doc. No. 05052060; 9 Foreign Affairs Manual (FAM) 40.6 N.3.2.

When considering whether courts should review "why the consular officer decided that [a particular inadmissibility] provision was applicable," Petitioners' Brief, 52, it is therefore vital to understand *where* "information in the government's hands," *id.*, originated, and to keep in mind that the consular officer himself or herself may well have no idea of the information's content or reliability.

Consular officers have access to the biometric and biographic Consular Consolidated Database (CCD), which contains more than 143 million visa application records; in 2012, the database also included more than 109 million photographs which are used for facial recognition. *Eleven Years Later: Preventing Terrorists from Coming to America*: *Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. 31-32 (2012) (statement of Edward J. Ramotowski, Deputy Assistant Secretary of State for Visas). This database links with others controlled by

DHS and the FBI that are created for purposes other than visa processing.[3] DOS also uses CLASS, reported in 2012 to contain more than 42.5 million records, *see* Wasem, *supra*, at 9, including those of 27 million persons found ineligible for visas or against whom potentially derogatory information exists. Ramotowski, *Eleven Years Later*, *supra*, at 31. "Almost 70 percent of CLASS records come from other agencies, including information from the FBI, DHS, DEA, and intelligence from other agencies." *Id.*

A second layer of visa security, mentioned above in the context of VSU personnel, is provided by DHS databases to which consular officers do *not* have access. A third layer comes into play when a case is screened for terrorism-related inadmissibility purposes. Starting in June 2013, interagency counterterrorism screening applies to *all* visa applicants. *See Border Security Oversight, Part III: Border Crossing Cards and B1/B2 Visas: Hearing Before the Subcomm.*

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[3] "[D]atabases linked with the CCD include DHS's Automated Biometric Identification System (IDENT) and the Federal Bureau of Investigation (FBI) Integrated Automated Fingerprint Identification System (IAFIS) results, and supporting documents. In addition to performing biometric checks of the fingerprints for all visa applicants, DOS uses facial recognition technology to screen visa applicants against a watchlist of photos of known and suspected terrorists obtained from the Terrorist Screening Center (TSC), as well as the entire gallery of visa applicant photos contained in the CCD. The CCD also links to the DHS's Traveler Enforcement Compliance System (TECS), a substantial database of law enforcement and border inspection information. . . ." Wasem, *supra*, at 6.

on National Security of the H. Comm. on Oversight and Government Reform, 113th Cong. 43 (2013) (statement of Edward J. Ramotowski, Deputy Assistant Secretary of State for Visa Services). In 2009, the time period relevant to Mr. Berashk's case, select cases referred for a Security Advisory Opinion (SAO) received specialized screening, drawing on the federal government's terrorism databases and watchlists.

The creation of such databases, and the dispersion of authority that they hide, began more than a decade *after* the era of consul-centered decision-making that the Petitioners describe, *see* Petitioners' Brief, 15; *see also id.* at 34, 40, and that the Court considered in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). The first terrorist watchlist was designed by a State Department employee in 1987. It was a set of 3 x 5 notecards kept in a shoebox, which quickly grew into a computerized system called TIPOFF, the direct progenitor of CLASS. *See* Jeffrey Kahn, MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS 10 (2013). As computer technology advanced, databases and watchlists proliferated. *Id.* at 135.

All of these systems suffered from the unwillingness of stove-piped federal agencies to share information. TIPOFF relied mainly on State Department sources for its biographical and derogatory information; other agencies' contributions were thin.[4] The

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[4] Thomas R. Eldridge, et al., *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks upon the*

(Continued on following page)

9/11 Commission criticized this "culture of agencies feeling they owned the information they gathered," and recommended reforms "to bring the major national security institutions into the information revolution." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* 417-18 (2004).

As a result, two new agencies were created to centralize control of information. One, the National Counterterrorism Center (NCTC), was designed "to merge and analyze all threat information in a single location." 149 Cong. Rec. 2033, 2035-36 (Jan. 28, 2003) (State of the Union Address of President George W. Bush). The second, the Terrorist Screening Center (TSC), was created to make, control, and distribute to other agencies the terrorist watchlists constructed from that information. Kahn, *supra*, at 149.

The TSC is a component of the FBI, staffed by employees from many different agencies who operate under FBI leadership. *Id.* at 148; U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations* 29 n.62 (Mar. 2014).

United States 80 (2004) ("In 2001, the CIA provided 1,527 source documents to TIPOFF; the State Department, 2,013; the INS, 173. The FBI, during this same year, provided 63 documents to TIPOFF – fewer than were obtained from the public media, and about the same number as were provided by the Australian Intelligence Agency (52).").

Unlike the NCTC, the TSC operates solely under the authority of presidential directives.[5] It does not provide direct administrative access or remedies to individuals. Kahn, *supra*, at 189.[6]

The TSC assembles and curates the Terrorist Screening Database (TSDB), an unclassified but law-enforcement-sensitive database that is comprised of terrorist-related information submitted primarily by the NCTC and the FBI. Information in the TSDB is what the TSC uses to create and supply watchlists for other federal agencies, such as the No Fly List (Transportation Security Administration (TSA)) and CLASS. The TSC also coordinates interaction between agencies using its watchlists and the original information sources used to compose them. The TSDB thus sits at the center of what one district court

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[5] *See* Homeland Security Presidential Directive/HSPD-11 § 2 (Aug. 21, 2008) ("The Terrorist Screening Center (TSC), which was established and is administered by the Attorney General pursuant to [Homeland Security Presidential Directive] 6, enables Government officials to check individuals against a consolidated Terrorist Screening Center Database."). The NCTC, by contrast, was established by Executive Order No. 13,354, 69 Fed. Reg. 53589 (Sept. 1, 2004), and later authorized by statute. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 1021, 118 Stat. 3638, 3672-75.

[6] *See also* Declaration of Christopher M. Piehota at 15 n.11, *Latif v. Holder*, No. 10-cv-00750-BR (D. Or. Nov. 17, 2010), ECF No. 44 ("The TSC does not accept redress inquiries directly from the public, nor does it respond directly to redress inquiries."). Mr. Piehota is currently director of the Terrorist Screening Center; at the time of his declaration, he was Deputy Director for Operations.

called the government's "web of interlocking watchlists." *Ibrahim v. DHS*, No. 06-cv-00545-WHA, 2014 WL 6609111, at *7 (N.D. Cal. Jan. 14, 2014).

The criteria for inclusion in the TSDB are rudimentary: "at least a partial name (e.g., given name, surname, or both) and at least one additional piece of identifying information (e.g., date of birth)," and some "evidence of a nexus to terrorism." U.S. Dep't of Justice, Office of the Inspector General, *Follow-up Audit of the Terrorist Screening Center* 3 n.23 (2007). What constitutes such a nexus is minimally defined. As one TSC director apprised auditors, "to err on the side of caution, individuals with any degree of a terrorism nexus were included" in the TSDB if the minimum necessary biographical data were available. U.S. Dep't of Justice, Office of the Inspector General, *Review of the Terrorist Screening Center* viii (2005). A later TSC director oversaw the development of a standard for inclusion, adapting the "reasonable suspicion" standard from *Terry v. Ohio*, 392 U.S. 1 (1968). DOJ OIG Report (Mar. 2014), *supra*, at 3, 7.[7] Notably, however, this standard is itself subject to secret exception. *Ibrahim*, 2014 WL 6609111, at *12.

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[7] *See also* Kahn, *supra*, at 158 (citing author's interview with TSC Director Timothy J. Healy and TSC General Counsel Jacqueline F. Brown (Dec. 4, 2009)), 302 n.10 (quoting from FBI Memorandum, *Counterterrorism Program Guidance Watchlisting Administrative and Operational Guidance* (Dec. 21, 2010)).

As a result, the TSDB is enormous. In 2009, the TSDB contained the names of roughly 400,000 people.[8] It is certainly much larger now.[9]

Government oversight agencies have repeatedly found fault with TSDB's maintenance. The FBI Inspector General's most recent report concluded that the FBI "maintained redundant and inefficient processes which hampered its ability to process watchlist actions in a more timely manner," including failures to ensure that subjects of closed investigations are removed from the TSDB. *See* DOJ OIG Report (Mar. 2014), *supra*, at 33. These findings followed previous audits that identified "significant weaknesses with the FBI's management of the terrorist watchlist." *Id.* at 34.

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[8] U.S. Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* 1 n.40 (2009); *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. 12 (2009) (statement of Timothy J. Healy, Director, Terrorist Screening Center).

[9] Neither the TSC nor the DOJ Office of the Inspector General has released a more recent statistic. However, the National Counterterrorism Center that maintains the TIDE system (from which most TSDB records are obtained) recently noted: "As of December 2013, TIDE contained about 1.1 million persons, most containing multiple minor spelling variations of their names." NCTC, Terrorist Identities Datamart Environment Factsheet (Aug. 1, 2014), *available at* http://www.nctc.gov/docs/tidefactsheet_aug12014.pdf.

The Inspector General concluded that "the FBI is unable to ensure that all individuals that were nominated to the watchlist are appropriately removed when cases are closed." *Id.* at 56. Previous audits also found high rates of error.[10]

These problems were all on display in *Ibrahim v. DHS*.[11] *Ibrahim* is the first, and so far only, bench trial concerning terrorist watchlists.[12] In January 2014, the court ordered substantial remedial measures for all U.S. terrorist watchlists to correct their erroneous inclusion of Rahinah Ibrahim. The government did not appeal the district court's judgment for the plaintiff, Dr. Ibrahim.

Dr. Ibrahim, a Malaysian national, lawfully entered the United States in 1983 to study architecture. She married, gave birth to a daughter, and after a decade back in Malaysia was completing doctoral

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[10] A DOJ Inspector General report issued in May 2009 concluded that "78 percent of the sampled investigations were not processed within FBI guidelines. In 67 percent of the cases reviewed the case agent failed to modify the watchlist record when required by policy, and in 8 percent of the cases reviewed the FBI failed to remove subjects from the watchlist as required by policy. In 72 percent of closed cases the FBI failed to remove the subject in a timely manner." *Id.* at 87 (summarizing report).

[11] Undersigned counsel Jeffrey Kahn testified as an expert witness for the plaintiff in this case.

[12] Other cases have proceeded based on stipulations agreed between the parties concerning factual allegations. Consequently, no other court has made findings of fact concerning allegations raised in complaints about terrorist watchlists. *See, e.g.*, *Latif v. Holder*, 969 F. Supp. 2d 1293, 1298 n.3 (D. Or. 2013).

work at Stanford University in 2005 when she attempted to travel to an international academic conference. After arriving with her fourteen-year-old daughter at a San Francisco airport check-in counter, and requesting a wheelchair, she was arrested, handcuffed, and transported to an airport jail. *Ibrahim*, 2014 WL 6609111, at *6. Although allowed to travel the next day, Dr. Ibrahim learned a few months later that her student visa had been revoked. *Id.* at *7.

The direct cause of what the district court described as "the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler," *id.* at *16, was an FBI agent. Agent Kelley nominated Dr. Ibrahim to the TSDB and to several terrorist watchlists about a month before they met at an interview he requested. *Id.* at *5, *6. Dr. Ibrahim's nomination to these watchlists happened, Agent Kelley admitted, because he incorrectly completed a form used for watchlist nominations. *Id.* at *5. The district court described the agent's mistake as the "bureaucratic analogy to a surgeon amputating the wrong digit." *Id.* at *16.

As a result, Dr. Ibrahim's name began to ricochet across various terrorism watchlists in "Kafkaesque on-off-on-list treatment." *Id.* at *18. This despite the fact, conceded by the government, that Dr. Ibrahim is not and was not a threat to U.S. national security. *Id.* at *5, *19. The district court concluded that "suspicious adverse effects continued to haunt Dr. Ibrahim in 2005 and 2006, even though the government

claims to have learned of and corrected the mistake." *Id.* at *17.

Dr. Ibrahim received no explanation for these actions; as noted, the TSC does not accept or respond to public inquiries.[13] Although Dr. Ibrahim's name was removed from the No Fly List shortly after her arrest, her name remained on the TSDB, from which it was added to the CLASS watchlist. *Id.* at *10.

Following Dr. Ibrahim's erroneous watchlist nomination, her F-1 student visa was revoked. Although the certificate of revocation noted that "information has come to light" indicating Dr. Ibrahim's possible ineligibility for her visa, *id.* at *10, the trial record did not identify what that could be. Instead, two e-mail exchanges revealed how the FBI agent's mistake ended up as the basis for revoking Dr. Ibrahim's visa; the consular officials responsible for handling her case neither contacted him nor knew why he nominated Dr. Ibrahim to the TSDB. Instead, the consular officials accepted the conclusion made by unknown TSC employees (who processed the unknown FBI agent's nomination), as a proxy for their own decision-making.

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[13] Complaints about the No Fly List through the DHS TRIP (Traveler Redress Inquiry Program) do not go directly to the TSC, but to DHS. It is unclear how many traveler complaints are forwarded from DHS to TSC, but this forwarding occurs only for positive matches to watchlists created by TSC for use by DHS component agencies (such as the No Fly List created for TSA). *See* Kahn, *supra*, at 191-92.

The first e-mail was sent the day after Dr. Ibrahim's arrest. Officials in the coordination division of the State Department's visa office discussed their frustration with a "stack of pending revocations" that included Dr. Ibrahim's:

> I have a stack of pending revocations that are based on VGTO [the FBI's Violent Gang and Terrorist Organization office] entries. These revocations contain virtually no derogatory information. After a *long* and frustrating game of phone tag with INR [the Department of State's Bureau of Intelligence and Research], TSC, and Steve Naugle of the FBI's VGTO office, finally we're going to revoke them.
>
> Per my conversation with Steve, there is no practical way to determine what the basis of the investigation is for these applicants. The only way to do it would be to contact the case agent for each case individually to determine what the basis of the investigation is. Since we don't have the time to do that (and, in my experience, case agents don't call you back promptly, if at all), we will accept that the opening of an investigation itself is a prima facie indicator of potential ineligibility under 3(B) [Immigration and Nationality Act, Section 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)].

Id. at *10 (emphasis in original).

The second e-mail, dated a month later, was sent by an employee in the State Department's visa office

coordination division to the chief of the consular section of the U.S. embassy in Malaysia:

> The short version is that [Dr. Ibrahim's] visa was revoked because there is law enforcement interest in her as a potential terrorist. This is sufficient to prudentially revoke a visa but doesn't constitute a finding of ineligibility. The idea is to revoke first and resolve the issues later in the context of a new visa application. My guess based on past experience is that she's probably issuable. However, there's no way to be sure without putting her through the interagency process. I'll gin up the revocation.

Id. at *11.

The "law enforcement interest" was Agent Kelley's incorrect nomination form. Once entered into the watchlisting system, Dr. Ibrahim's name was snared by the "web of interlocking watchlists." *Id.* at *7. This continued despite the submission, a year later, of a request by an unidentified government agent that her name be "Remove[d] From ALL Watchlisting Supported Systems (For terrorist subjects: due to closure of case AND no nexus to terrorism)." *Id.* at *11.

Ibrahim exposes two problems with databases and watchlisting that directly affect visa decisions.

First, databases and watchlists have in some regular instances displaced the traditional role of consular officers in visa adjudications. A single FBI

agent submitting a wrongly completed watchlist-nomination form led to Dr. Ibrahim's addition to the No Fly List and the revocation of her student visa. DOS consular officials deferred entirely to watchlists created by officials from another agency based on information from an inaccessible FBI agent. In *Amici*'s experience, this example typifies the post-Homeland Security Act era. The FBI's information sources were unknown to the consular officials responsible for communicating a final visa determination to Dr. Ibrahim.

Second, errors reverberate through the watchlisting system undetected or, worse, impervious to attempts to purge them. As the district court in *Ibrahim* commented: "Once derogatory information is posted to the TSDB, it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away." *Id.* at *16. With specific reference to CLASS, the court added that "bad information may remain there and may linger on there" even if the original entry in the TSDB is corrected or changed. *Id.* at *17. DOS maintains its files, linked to past and present CLASS entries, "until the applicant reaches age ninety and has no visa application within the past ten years." *Id.* at *10.

Judicial review is therefore an essential protection to prevent visa denials based on erroneous information. The mistake in Dr. Ibrahim's case went undetected until disclosed in a deposition ordered by the district court, over government opposition, three

months before trial. *See* Omnibus Order on Pending Motions at 14, *Ibrahim v. DHS*, No. 06-cv-00545-WHA (N.D. Cal. Aug. 23, 2013), ECF No. 532; Defendants' Opposition to Plaintiff's Motion for Continuance [Redacted] at 2, *id.* (Aug. 7, 2013), ECF No. 520. Her case – nearly eight years of litigation – revealed what others refused visas lack the resources and perseverance to expose: the inherent weaknesses and flaws in the new visa-security system. None of the remedial audits or other mechanisms for self-correction undertaken by the TSC and its customer agencies uncovered the error on which so many official actions were based.

The use today of numerous databases and watchlists for visa decisions explains why the DHS Inspector General described interagency security vetting as leading to decisions often dictated to DOS, rather than made using consular discretion: "After conducting their review, *the respective agencies inform DOS whether the applicant is eligible for a visa.*" DHS Visa Security, *supra*, at 7 (emphasis added). This is a world apart from the traditional exercise of consular discretion.

Indeed, there is no reasonable opportunity for consular officers to exercise consular discretion once a barrier to visa approval is erected by another agency. Denials occur regardless of whether the consular officer is completely in the dark about the rationale (and regardless of whether the consular officer might possess or become aware of information that might mitigate or disprove inadmissibility, or

could contribute to a fruitful line of inquiry to reach that conclusion). In fact, DHS decisions in the U.S., based on TSC watchlists, on occasion override the judgment of consular officers at far-off posts. Judicial review for mistakes is imperative to ensure that modern technology-driven visa processing does not sweep aside American values of fairness and accuracy, shattering family unity.

III. The Court should hold that judicial review of visa denials is available where there was no actual, legitimate exercise of consular discretion.

As then-Circuit Judge Ginsburg underscored, "[t]he Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). The Court of Appeals in this case correctly required the government to provide more information regarding Mr. Berashk's visa denial, in order to ensure that the denial was lawful.

While the exercise of consular discretion should ordinarily receive appropriate deference, *cf. Kleindienst*, 408 U.S. 753, judicial review should be available to examine claims that a visa applicant was

incorrectly deemed inadmissible using information beyond the purview of properly exercised consular discretion. Drawing the line in this fashion would greatly restrict the number of cases brought to federal court. Contrary to the Petitioners' concern that all 112,405 visa applications denied under 8 U.S.C. § 1182(a) in fiscal year 2013 would end up being reviewed, *see* Petitioners' Brief, 31 n.10, DOS statistics indicate that visa denials susceptible to searching judicial review would constitute a far smaller subset. For example, only 28 immigrant-visa refusals under 8 U.S.C. § 1182(a)(3)(B) – the ground used to exclude Mr. Berashk – were issued during fiscal year 2013.[14] In each of those cases, if the inadmissibility ground(s) could be overcome there is a statutory right for the applicant to be issued an immigrant visa.

In this case, Ms. Din deserves a judicial accounting of whether a specific statutory ground of inadmissibility was properly applied to deny Mr. Berashk's immigrant-visa application. This is particularly so because, as the government recognizes, "numerous

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[14] U.S. Dep't of State, *Immigrant and Nonimmigrant Visa Ineligibilities: Fiscal Year 2013*, *available at* http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf. None of the 28 ineligibility findings for immigrant visas is listed as having been overcome. There were also 591 non-immigrant visa ineligibility findings based on 8 U.S.C. § 1182(a)(3)(B) in fiscal year 2013, 352 of which were overcome. This may indicate a high error rate in the initial findings which are then corrected, to some extent through a waiver process available to certain non-immigrants (but not to immigrants) under 8 U.S.C. § 1182(d)(3)(B)(i).

provisions of the INA reflect a concern for promoting family unity among U.S. citizens and their undocumented families." Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 43, *Texas v. United States*, No. 14-CV-254 (S.D. Tex. Dec. 24, 2014), ECF No. 38 (citing *INS v. Errico*, 385 U.S. 214 (1966), and giving as an example 8 U.S.C. § 1151(b)(2)(A)(i) (placing no limits on number of immigrant visas available for parents of U.S. citizens older than 21)).

The mission of consular officers officially includes "[h]elping U.S. citizens with family reunification." U.S. Dep't of State, *Career Tracks for Foreign Service Officers*, *available at* http://careers.state.gov/work/foreign-service/officer/career-tracks. Moreover, given the serious delays that loss of a priority date cause for many immigrant-visa applications, careful review of denials that are not based on the actual, legitimate exercise of consular discretion is all the more necessary to ensure family unity for U.S. citizens in qualifying cases. *Amici* believe that visa decisions issued by consular officers, the bread and butter of our long careers, have consequences of a magnitude that warrants judicial error-correction in an appropriate subset of cases. For these reasons *Amici* respectfully request that this Court preserve reviewability of those visa denials.

CONCLUSION

Amici respectfully urge the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, *et al.*,
Petitioners,

v.

FAUZIA DIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LAW SCHOOL PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

This amici curiae brief is submitted on behalf of 73 professors and academics who teach immigration law at law schools throughout the United States ("Amici"). A complete list of amici is provided in Appendix 1.

Amici teach and/or practice in the field of immigration and nationality law. Amici seek to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice for individuals seeking benefits in immigration and naturalization matters.

SUMMARY OF THE ARGUMENT

This brief is submitted to provide the Court with historical background regarding the origins, nature, evolution, and limits of the so-called doctrine of consular non-reviewability. In Part A, we describe the initial adoption by Congress of a visa requirement and describe two important early cases that arose shortly thereafter, *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), and *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929). Although these cases are often cited as the cornerstone of

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[1] The parties were given notice and have consented to the filing of this brief. Their written consents are both included with this filing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

consular non-reviewability, they do not support the position that consular decisions denying visas are inherently or absolutely unreviewable. As Part B explains, subsequent cases failed to reexamine these premises even in the face of significant statutory developments, such as the enactment of the Administrative Procedure Act and the Immigration and Nationality Act, as well as the later elimination of the amount-in-controversy requirement for general federal question jurisdiction. In Part C, we describe this Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which recognized limited review of visa decisions to ensure that the action had a "facially legitimate and bona fide" basis. The *Mandel* decision recognizes that judicial review is appropriate when the rights of U.S. citizens are at stake but limits the judicial role because of plenary power concerns. In Part D, we explore the development of this "facially legitimate and bona fide" standard and argue that, consistent with this standard, judicial review can and should include: (1) review of questions of law, to ensure that the decision of the consular officer does not violate the governing statute or regulations; (2) review to ensure that there is a bona fide factual basis for the decision; and (3) review to ensure that minimally fair procedures have been used in making the decision. This limited review respects the plenary power of Congress and the Executive Branch but also provides limited protection for the constitutional rights of U.S. citizens that are at stake. Finally, in Part E, we note that this interpretation of the "facially legitimate and bona fide" standard is fully consistent with 8 U.S.C. § 1182(b)(3), which limits the obligation of the government to provide details behind a denial based on certain grounds of inadmissibility.

ARGUMENT

A. Origins of the Doctrine of Consular Non-Reviewability: the Early Cases

Prior to 1917 noncitizens seeking to enter the United States were not required to obtain a visa. Individuals could present themselves at the border and seek admission; if they were inadmissible, they would be refused entry. In 1917, during World War I, the Department of State and the Department of Labor issued a joint order to diplomatic, consular and immigration officers requiring that noncitizens have a passport and visa before seeking entry into the United States. Joint Order of Department of State and Department of Labor (July 26, 1917). The president designated the Secretary of State as the official in charge of issuing the visas. A year later, as a war time measure, Congress confirmed the visa requirement by authorizing the President to make "reasonable rules, regulations, and orders" for the entry of noncitizens into the United States. Act of May 22, 1918, 40 Stat. 559, 22 U.S.C. §§ 223–226. Shortly thereafter, the President required noncitizens seeking entry to have a visa, and after World War I ended, Congress enacted legislation to continue the passport and visa requirement indefinitely. Exec. Order No. 1,473 (Aug. 8, 1918); Act of March 2, 1921, 41 Stat. 1205, 1217, 22 U.S.C. § 227.

Initially, U.S. consular officers issued visas as a ministerial act without screening for grounds of inadmissibility; they would simply issue the visa and advise the applicant of the various inadmissibility grounds, leaving the determination of inadmissibility

to immigration officers at the port of entry.[2] As a result, noncitizens faced the prospect of making a long and expensive trip to the United States only to be detained at the border and then returned home. In 1924 Congress enacted a provision requiring that consular officers make a determination of admissibility before issuing the visa. Act of 1924, 43 Stat. 153, 8 U.S.C. § 202(f). When Congress enacted the Immigration and Nationality Act in 1952, the visa and passport requirement was included, Act of June 27, 1952, 66 Stat. 181, 190, §§ 211, 215 (codified at 8 U.S.C. §§ 1181, 1185) and it continues to the present day.

During the years immediately after the visa requirement was first established, there was no clear mechanism to challenge consular decisions. If a person wanted to enter the United States, s/he would appear at the border and request entry; if refused, s/he could file a habeas petition challenging the exclusion. However, that would not work as a mechanism for reviewing the consular officer's decision. A habeas petition is filed against the person holding the petitioner in custody—the border officer. The consular officer is not in the picture. In a habeas petition, if the petitioner did not have a visa then the border officer would be acting lawfully in refusing to admit the petitioner into the United States.

The Court did not consider the reviewability of consular decisions during this period. Two circuit court

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[2] *See generally* L. Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San Diego L. Rev. 887, 892 (1989).

decisions from the 1920s, however, addressed consular visa decisions in response to challenges brought by potential immigrants or their citizen relatives. Although these two cases did not squarely hold that consular decisions were unreviewable, they both contain language cited by later courts for that proposition. Close examination of these decisions reveals that, even in its foundational cases, the "doctrine of consular non-reviewability" was less airtight than later courts have assumed.[3]

1. London v. Phelps.

In *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), the petitioner, Mrs. London, wanted to visit her children in New York City. She applied for a visitor's visa at the U.S. consulate in Montreal, but was refused. She then appeared at the border seeking entry and was refused because she did not have a visa. After being refused entry, Mrs. London filed a habeas petition naming the U.S. immigration inspector as the respondent. She first argued that, as a person seeking entry from Canada, she was not required to have a visa under regulations that had been adopted in 1918. The court rejected that argument, finding that the Act of March 2, 1921, superseded the earlier regulations. *Id.* at 289.

Mrs. London argued further that even if the visa requirement was lawfully imposed, issuing a visa is a ministerial act that the court should deem to have been

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[3] *See also* Stephen H. Legomsky, *Immigration and the Judiciary – Law And Politics In Britain And America* (1987), at 144-51 (discussing early cases on the evolution of consular non-reviewability).

performed.[4] The court rejected that argument as well, stating that "the giving of a visé is not merely a ministerial act" and noting that the consular officer must at least "'satisfy himself of the temporary nature of the visit'." *Id.* at 290. Because Mrs. London did not have a visa, she was properly excluded at the border. *Id.*

That should have been enough to resolve the case, but the court went on to add the following dictum (on which courts have often relied as a basis for the doctrine of consular non-reviewability):

> Unjustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. It is beyond the jurisdiction of the court.

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[4] *See In re Spinnella*, 3 F.2d 196 (S.D.N.Y. 1924) (where visa was not issued because the consular officer did not have the appropriate forms, "this court will look upon that as done which ought to have been done, and holds that the alien had that which the law required").

Id. (citing 3 Moore's Digest, 996).[5] That statement may have been correct in the context of that case. The habeas petition named the immigration inspector as the respondent, not the Department of State. And at the time, the federal question jurisdictional statute, 28 U.S.C. § 1331, gave district courts jurisdiction over claims "arising under the Constitution, laws, or treaties of the United States," but only subject to a $3,000 amount-in-controversy requirement that was not met in this case. Act of March 3, 1911, 36 Stat. 1091, 28 U.S.C. § 41(1). Thus, the *Phelps* court lacked jurisdiction to order the consular officer to issue a visa. But nothing in the case indicates that consular decisions are inherently unreviewable.

2. Ulrich v. Kellogg.

In *United States ex. rel. Ulrich v. Kellogg*, 30 F.2d 984, 985 (D.C. Cir. 1929), the petitioner, a U.S. citizen, filed a petition for writ of mandamus asking the court to order the U.S. consulate in Berlin to issue a visa on

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[5] 3 Moore's Digest provides no authority for the proposition that courts lack jurisdiction to review consular decisions; it simply reports one instance where the United States objected to Russia concerning the practice of consulate officers who refused visas to Jewish U.S. citizens seeking to travel to Russia to claim property. Thus, it appears that the *London* court was "less than meticulous" in its use of the term "jurisdiction" *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (describing such "unrefined dispositions" as "'drive-by jurisdictional rulings' that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit"); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *see also Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. Rev. 1137, 1143-44 (1977) (describing the court's dicta about lack of jurisdiction as a "gratuitous afterthought").

behalf of his wife, a German citizen. The consulate had denied his wife's application for a visa on the ground that she had been convicted of larceny, a crime of moral turpitude. Ulrich named the Secretary of State as respondent and sought an order declaring that the conviction was not a crime of moral turpitude and requiring, inter alia, the Secretary of State to instruct the U.S. consul in Berlin to issue a visa. *Id.*

The court did not find that it lacked jurisdiction to review decisions of consular officers. Indeed, the court reached the merits of the substantive question, holding that the conviction for larceny did constitute a crime of moral turpitude that made the petitioner's wife inadmissible. *Id.* at 986. Thus, according to the court, the consular officer had properly denied the visa.

The court went on to consider whether, even if the decision of the consular officer was incorrect, the court could order the Secretary of State to instruct a consular officer to issue a visa. The problem, according to the court, was that the statute vested the authority to issue visas with consular officers, not with the Secretary of State, and there was no provision in the immigration laws for "an official review of the action of the consular officers in such case by a cabinet officer or other authority." *Id.*[6] The court, therefore, concluded that it

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[6] The statute was later amended to provide explicitly that the Secretary of State does not have authority over the administration of the immigration laws relating to "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. §1104(a) (1952). Although the legislative history is unclear, it appears that this provision was adopted in order to confirm that the Attorney General – rather than the Secretary of State – has the power to review consular

could not order the Secretary of State to issue a visa, nor could it order that he direct a consular officer to issue a visa, because the statute did not authorize the Secretary of State to do so. The court did not address how it might decide the case if the appropriate consular official had been properly named as a respondent. And, as in *London*, the court did not indicate that consular decisions are for any reason inherently unreviewable.[7] In fact, given that the court reached the merits of the inadmissibility decision, the opinion implies that consular decisions are reviewable.

B. The 1940s and 1950s: the Emergence of a Widely-Cited Non-Reviewability Doctrine.

In the early years, it proved difficult or even impossible for a person refused a visa to obtain judicial review of the consular officer's decision.[8] There was no

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decisions, not in order to preclude administrative review altogether. *See* James Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 24-25 (1991).

[7] The court did refer to statutory language giving discretion to the consular officer. 30 F.2d at 986. However, "the limited discretion of consular officers does not support the idea that courts cannot review visa denials." S. Legomsky, supra n. 3, at 147. *See also Nakamoto v. Ashcroft*, 363 F.3d 874, 879–880 (9th Cir. 2004) (concluding that "the phrases 'to the satisfaction of the Attorney General' and 'in the opinion of the Attorney General' . . specify the identity of the decision-maker, indicating that it is the Attorney General who is authorized to determine the facts in the first instance," not that the decision is "entirely discretionary").

[8] It was possible to sue a consular officer for money damages, and the consular officer would be liable if guilty of an abuse of power. *See* 22 U.S.C. § 1199; *Am. Sur. Co. of New York v. Sullivan*, 7 F.2d

case law holding that consular officer decisions were inherently unreviewable, but nor was there a workable mechanism to obtain review. The statutory provision establishing district court jurisdiction over general federal questions included a $3,000 amount-in-controversy requirement.[9] A habeas petition brought against the detainee's custodian could not name the consular officer as the respondent. And a petition for a writ of mandamus was not viable because courts like *Phelps* had held that the granting of a visa was not a simple ministerial act but instead involved some level of discretion.

That situation potentially changed with the enactment of the Administrative Procedure Act in 1946 and the Immigration and Nationality Act in 1952. Section 279 of the INA gave courts jurisdiction over "all causes" arising under Title II of the statute,[10] while Section 10 of the APA permitted judicial review for any person "adversely affected or aggrieved" by an agency

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605 (2d Cir. 1925) (finding the consular officer liable for the failure to issue a visa).

[9] The amount in controversy requirement was subsequently eliminated. *See* Pub. L. No. 94-574, § 2, 90 Stat. 2721 (Oct. 2, 1976).

[10] The original version of INA Section 279 provided that "district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title." 8 U.S.C. § 1329 (1952). The "provisions of this title," sections 201–292 of the INA, included INA § 221, 8 U.S.C. § 1201, governing issuance of visas. Thus, section 279 potentially impacted subject matter jurisdiction over claims involving the denial of visas. This provision was later amended in 1996, making it applicable only to suits brought by the government.

action.[11] These provisions therefore afforded courts the opportunity to examine the origin and appropriate scope of the consular non-reviewability doctrine if they chose to do so in conjunction with potential claims brought under the new statutes.

Cases from this period, however, largely failed to examine the doctrine in any depth or to consider potential alternative bases for judicial review. Instead, courts largely relied on broad invocations of Congressional plenary power over immigration and on broadly-worded dicta from cases that had been decided before the APA and INA, in the context of an amount-in-controversy requirement for general federal question jurisdiction. Thus, the doctrine of consular non-reviewability became entrenched with little examination of its underpinnings or limitations.

For example, in *Licea-Gomez v. Pilliod*, 193 F. Supp. 577 (N.D. Ill. 1960), the petitioner was excluded for lacking a visa. The petitioner then filed a complaint for declaratory judgment under the APA challenging the exclusion order and the consular officer's refusal to issue a visa. The court acknowledged that, under the APA, the petitioner was able to challenge the exclusion

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[11] Section 10 of the APA provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Pub. L. 79-404, § 10, 60 Stat. 237, 243 (1946) (currently codified at 5 U.S.C. § 702). Although the APA does not provide an independent basis for jurisdiction, *see Califano v. Sanders*, 430 U.S. 99 (1977), it created "a cause of action for 'persons' ... aggrieved by agency action." *Seafarers Int'l Union v. Coast Guard*, 736 F.2d 19, 25 (2d Cir. 1984). *See also Webster v. Doe*, 486 U.S. 592, 599 (1988).

order in a declaratory judgment action. 193 F. Supp. at 579. However, although the declaratory judgment action potentially included review of the consular officer's decision, the court declined to consider arguments relating to the denial of the visa, citing three provisions of the immigration code as well as the *Ulrich* case. 193 F. Supp. at 582 (citing 8 U.S.C. §§ 1104(a), 1151 & 1201).

The three immigration law provisions cited by the court, however, did not address reviewability of consular visa denials. Section 1104(a) provides that the Secretary of State does not have power over the decisions of consular officers relating to the granting or denial of visas but does not address the district court's ability to review consular decisions. Section 1151 sets forth categories of immigration visas but does not limit review of decisions relating to those visas. Section 1201 merely states that a consular officer "may issue" a visa to a visa applicant but does not restrict judicial review. Thus, rather than consider the actual authority behind the doctrine of consular non-reviewability or the potential impact of the new statutes on that doctrine, the court largely assumed the existence of the doctrine.

Similarly, *Loza-Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969), addressed consular decisions, but only in the context of a petition for review of an order of deportation. Before the petitioner entered the United States, he had applied for an immigrant visa, which was denied. *Id.* at 346. The INS had incorrectly informed the consulate that Loza-Bedoya was ineligible because he had previously been involved in an alien smuggling scheme, and acting on that information, the

consulate denied the visa. After being denied the visa, Loza-Bedoya entered the United States without inspection and later was placed in deportation proceedings and ordered deported. He subsequently filed a motion to reopen, which was denied, and then filed a petition for review under 8 U.S.C. § 1105a (1962), seeking judicial review of the denial of the motion to reopen.

The court held that judicial review under § 1105a(a) is limited to the administrative record created in the deportation proceedings. *Id.* Thus, the only issue before the court was whether the denial of the petitioner's motion to reopen by the Board of Immigration Appeals constituted an abuse of discretion. Because the Board did not abuse its discretion, the court affirmed that decision. *Id.* at 347.

As to the petitioner's argument that the consular officer's decision had been based on incorrect information provided by INS concerning a charge of alien smuggling, the court stated:

> Congress has conferred upon consular officers authority to issue or withhold a visa. Such determination is not subject to either administrative or judicial review. As harsh as the conclusions are here, a correction of the record could not in any manner affect the deportation petitioner seeks to avoid. ... Though erroneous this Court is without jurisdiction to order an American consular official to issue a visa to any alien whether excludable or not.

Id. (*citing* 8 U.S.C. § 1201(a); *Ulrich*, 30 F.2d 984; *London*, 22 F.2d 288).

The court's conclusion that it had no jurisdiction to review the consular officer's decision was correct in the context of that particular case. The petitioner sought review under 8 U.S.C. § 1105a(a) of the order of deportation issued by the BIA, and therefore the court's review was necessarily limited to the administrative record relating to the motion to reopen. But the court did not examine the authority cited in support of the consular non-reviewability doctrine or consider whether jurisdiction to review a consular officer's decision might be available outside the context of review under § 1105a. Nonetheless, *Loza-Bedoya* contributed to the growing body of case law reciting the doctrine of consular non-reviewability.

By the early 1970s, there was no firm basis for the commonly recited statement that decisions of consular officers were inherently unreviewable. Instead, the cases typically cited from this period, such as *Licea-Gomez* and *Loza-Bedoya*, largely invoked earlier recitations of the same general sentiment, without carefully examining the scope of reviewability or the potential sources of subject matter jurisdiction. Furthermore, these cases were decided when general federal question jurisdiction required a minimum amount in controversy. With the elimination of that requirement in 1976, general federal question jurisdiction under 28 U.S.C. § 1331 provided an additional basis for subject matter jurisdiction.

At the same time, this Court's cases addressing the plenary power of Congress to set the conditions for entry and exclusion, with limited judicial review, did not generally analyze consular decisions in particular. *See, e.g., United States ex rel. Knauff v. Shaughnessy*,

338 U.S. 537, 543 (1950) (rejecting challenge to denial of permission to enter the country and holding that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"). Even these general plenary power cases, however, recognized the availability of judicial review for constitutional and statutory claims and to determine whether the executive official had acted pursuant to valid authority. *E.g.*, *id.* at 543-46 (rejecting petitioner's claims that the regulations were unreasonable or that the War Brides Act required a hearing, and acknowledging that the Attorney General had acted pursuant to valid regulations).[12] Examining this authority, Judge Posner later recognized that the

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[12] Indeed, recognition of the limits on plenary power is almost as old as recognition of the doctrine itself. *See, e.g.*, *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (Holmes, J.) ("The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus."); *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892) (even though the political branches have plenary power, a noncitizen denied entry into the United States "is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful"); *Katz v. Comm'r of Immigration*, 245 F. 316, 319 (9th Cir. 1917) ("where there is substantially no evidence competent to establish the charge preferred, it then becomes a question of law for the court"). This Court has recognized this history in recent years. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301, 311 (2001) (judicial review is available "as a means of reviewing the legality of [the order of removal]", even where the statute "preclud[es] judicial review to the maximum extent possible under the Constitution"); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (noting that plenary power "is subject to important constitutional limitations").

doctrine of "consular nonreviewability, like most general legal principles it is qualified." *Samirah v. Holder*, 627 F.3d 652, 662 (7th Cir. 2010).

C. *Kleindienst v. Mandel* and Consular Non-Reviewability.

In 1972, the Court issued an important decision often cited in support of the doctrine of consular non-reviewability. In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court held that Congress could delegate the power to exclude would-be immigrants to the Executive Branch and that courts could not "look behind" a legitimate exercise of that discretion. *Mandel* involved review of the Attorney General's discretionary decision not to grant a nonimmigrant waiver for Mr. Mandel, who was found inadmissible on ideological grounds. The Court based its decision on plenary power concerns, but its focus was primarily on the plenary power of *Congress*, not the 'plenary power of the agency implementing Congress's policy choices. *See, e.g., id.* at 766 (pointing to "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden'").[13] With respect to the agency's position on whether a discretionary waiver of the grounds of inadmissibility should be granted, the Court did not hold that the agency decision is beyond

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[13] The Court also cited *Ekiu v. U.S.*, 142 U.S. 651 (1892), which recognizes that noncitizens—even noncitizens seeking entry at the border—have the right to challenge an administrative decision as inconsistent with the law passed by Congress. *See id.* at 660 (a person barred from entering the United States "is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful").

judicial review. Instead, the Court explicitly recognized that the agency decision is subject to at least limited judicial review.

According to the Court, the agency is called on to weigh competing interests (the interests of U.S. citizens in associating with the noncitizen on the one hand and the interests of the government in excluding the noncitizen on the other). Although the balancing of these interests "has, properly, been placed in the hands of the Executive," this does not mean that the Executive has "sole and unfettered discretion." *Id.* at 769. Instead, the Court reviewed the decision to ensure that there was at least a "facially legitimate and bona fide reason" for the agency's exercise of discretion. *Id.* Thus, the Court indicated that the agency must interpret the statute correctly (that is, the reason given by the agency must be "facially legitimate") and must have at least some factual basis for its decision (the reason given must be "bona fide"). Indeed, the Court held that the power delegated to the Executive was *conditioned* on the Executive acting on the basis of a facially legitimate and bona fide reason. *Id.* at 770. As the Court noted, "the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by Mandel made it inappropriate to grant a waiver again" and, in light of this facially legitimate and bona fide reason, the Court believed that "the Attorney General validly exercised the plenary power that Congress delegated to the Executive." *Id.* at 769. To the extent that there is a "take away" from *Mandel*, it is not that decisions regarding visa issuance are unreviewable, but rather that at least some judicial review is available to ensure

that the agency has acted in a manner consistent with the policies adopted by Congress.[14]

Subsequent decisions have recognized that the holding of *Mandel* embraces consular visa decisions. *See, e.g.*, *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir 1986). Many courts have also acknowledged the limitation on the doctrine of consular non-reviewability recognized by *Mandel*, explicitly permitting inquiry into whether the Executive has provided a facially legitimate and bona fide reason in support of the consular visa decision. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). Close examination of the "facially legitimate and bona fide reason" standard reveals three aspects of limited judicial review that may be applied to consular visa denials.

D. The "Facially Legitimate and Bona Fide Reason" Standard.

The "facially legitimate and bona fide reason" standard reflects the concern that courts should respect

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[14] In *Fiallo v. Bell*, 430 U.S. 787, 795 (1977), the Court rejected a challenge to the denial of preferential immigration status for illegitimate children of U.S. citizen fathers after concluding that "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*." *See also id.* at 793 n.5 (rejecting the government's argument that the case was "not an appropriate subject for judicial review" and noting that "[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens").

the plenary power of the political branches of government over immigration. However, this plenary power is not absolute. Many cases have both recognized this plenary power and nonetheless provided for judicial review. Most notably, judicial review has often been available despite the plenary power doctrine when the petitioner claims that the agency has exceeded its authority or acted in a manner inconsistent with congressional intent, where the agency has no reasonable factual basis for its decision, or where there is a viable procedural challenge based on due process concerns.

1. *Review of Claims that an Agency has Exceeded its Authority or Acted Inconsistently with Governing Law.*

Under the "facially legitimate and bona fide reason" standard, courts may review an agency's action to ensure that it has acted according to properly interpreted statutory authority. For example, in *Abourezk*, the D.C. Circuit accepted jurisdiction to review whether the denial of a visitor's visa was consistent with the statute. At issue was whether the consular officer had properly found the noncitizen inadmissible based on a reason to believe that he would engage in activities prejudicial to the public interest. The Court of Appeals recognized jurisdiction "to insure that the challenged government action is within the statutory and constitutional authority of the State Department." 785 F.2d at 1062. As explained by then-Circuit Court Judge Ruth Bader Ginsburg:

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far

> as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Id. at 1061.[15]

Likewise, in *Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010), the Ninth Circuit held that the court could review the consular officer's action to see whether under the APA it was "'not in accordance with law'." The petitioner alleged that the consular office had failed to follow the governing regulations regarding termination of an immigrant visa. That question, said the court was one "of statutory interpretation, rather than an assessment of reasonableness in the instant

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[15] This accords more generally with the central role the judiciary always must play in interpreting statutes governing executive action. "Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Judicial review of questions of law is appropriate in order to correct decisions that are inconsistent with Congressional intent. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985) (reviewing INS internal operating procedures regarding the issuance of visas and noting "federal courts have jurisdiction over this type of case to assure that the executive departments abide by the legislatively mandated procedures"); *Friedberger v. Shultz*, 616 F. Supp. 1315, 1318 (E.D. Pa. 1985) (stating that, in reviewing the statutory and regulatory scheme to determine whether the consular officer acted lawfully in denying a visa, "[w]e do not understand the government to assert that the doctrine of sovereign prerogative allows the Executive to act in a manner contrary to Congressional mandate").

case." *Id.* at 1088. Thus, the doctrine of consular non-reviewability did not apply. *See also Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (noting jurisdiction exists "when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion").

In *American Academy*, 573 F.3d 115, three U.S. organizations challenged the decision of the U.S. consulate to deny a visa to a well-known Islamic scholar on the ground that he had provided "material support" to a terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). The Second Circuit held that even if the "facially legitimate and bona fide reason" standard is designed to respect the "plenary power" of the political branches, the standard allows review to ensure that the consular officer has "properly construed and applied [the relevant] statutory provisions." 573 F.3d at 126. In other words, if the decision of the consular officer is based on an incorrect interpretation of the statute, or if the consular officer applies the statute in a legally improper manner, then the decision may be reversed. *Accord Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013).

2. *Review for the Existence of a Factual Basis for the Decision.*

In addition, under the "facially legitimate and bona fide reason" standard, courts may review a consular officer's decision to ensure that it is supported by at least some reasonable factual basis. Without at least some factual basis for the decision, it can hardly be supported by a "bona fide reason." For example, there would be no "bona fide reason" present if a government

official assessed a penalty or denied a benefit based on wholly arbitrary factors.[16]

In *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990), the First Circuit engaged in a limited review of the evidence to determine "whether there was sufficient evidence to form a 'reasonable ground to believe' that the alien had engaged in terrorist activity." *Id.* at 649. In *Marczak v. Greene*, 971 F.2d 510 (10th Cir. 1992), the court considered the denial of parole to individuals facing exclusion proceedings and concluded that under the "facially legitimate and bona fide reason" standard, the court must review the agency decision to ensure that it is "at least reasonably supported by the record." *Id.* at 517 As the court noted:

> It is tempting to conclude from the broad language of the test that a court applying the "facially legitimate and bona fide" standard would not even look to the record to determine whether the agency's statement of reasons was in any way supported by the facts This has not, however, been the practice of any of the courts that have adopted the standard in immigration matters.

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[16] This comports with general legal principles governing review of agency actions. Cf. *Marozsan v. United States*, 852 F.2d 1469, 1478 (7th Cir. 1988) (rejecting interpretation of statute governing review of Veterans Administration decisions that would preclude review of "obviously unconstitutional decisions" like eligibility based on whether someone was born on the Fourth of July); *U.S. ex rel Campbell v. Pate*, 401 F.2d 55, 57 (7th Cir. 1968) ("the relevant facts ... must not be so capriciously or unreliably determined that, in effect, the [individual] is deprived of equal protection of the laws").

Id. (examining cases exploring record support under the "facially legitimate and bona fide" standard); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1082–83 (9th Cir. 2006) (rejecting the agency's decision because it was "based on facially implausible evidence, and ignores [evidence in the record]"); *Amanullah v. Nelson*, 811 F.2d 1, 17 (1st Cir. 1987) (indicating that at least some inquiry into the factual basis for the agency decision is necessary to ensure that the decision is not lacking at least some factual support).

In *American Sociological Ass'n v. Chertoff*, 588 F Supp. 2d 166 (D. Mass. 2008), the plaintiffs challenged the consular officer's decision to deny a visitor's visa on the basis of INA § 212(a)(3)(B)(i)(I) (inadmissibility for having engaged in a "terrorist activity"). The court rejected the government's argument that there was no review permitted even if no reason for the decision was given. According to the court: "The incentive the defendants' proposed interpretation would give the government would be perverse: better to give no reason for a denial so that it would be unreviewable than to give a reason and be second-guessed by a court." 588 F. Supp. 2d at 170. The court denied the government's motion to dismiss, recognizing that the court can require the consular officer to provide a factual basis for the decision.

3. Review for Fundamentally Fair Procedures.

Although the exact scope of constitutionally protected rights at stake in the context of consular visa decisions is beyond the scope of this brief, courts have recognized that such constitutionally protected interests exist and warrant the protection of fundamentally fair procedures. *E.g.*, *Mandel*, 408 U.S.

at 762-765 (First Amendment rights of association); *Bustamante*, 531 F.3d at 1062, (Fifth Amendment liberty interests in marriage and family life); *see* also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) (freedom of personal choice in matters of marriage and family life is a liberty interest protected by the Due Process Clause). To the extent a U.S. citizen claimant has a cognizable liberty or constitutional interest in a consular visa decision, review must be available under the "facially legitimate and bona fide reason" standard to ensure that such liberty interests receive procedural protections.

The Court has recognized the need for procedural protections in the context of a non-citizen resident returning to the United States after a visit abroad. Such a non-citizen has a protectable liberty interest that requires the United States to provide fundamentally fair procedures before blocking reentry. For example, in *Landon v. Plasencia*, 459 U.S. 21, 33 (1982), where the Immigration and Naturalization Service was attempting to exclude a returning resident, the Court held that "a continuously present permanent resident alien has a right to due process in such a situation." *See also Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963) ("the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 593-595 (1953) (noncitizen resident entitled to constitutional due process hearing after exclusion following a five-month voyage abroad). Under *Mandel*, a U.S. citizen who has filed a non-citizen visa petition (such as, for example, a U.S. citizen seeking to exercise constitutional rights of association or a U.S. citizen who has filed a petition

for a noncitizen spouse) should also have basic procedural protections, as would a non-citizen returning from abroad.

Several basic procedural protections are relevant here. The most "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Rusu v. INS*, 296 F.3d 316, 321 (4th Cir. 2002) (applying "the principles of *Mathews v. Eldridge*" to immigration proceedings). Courts have uniformly recognized that this means at least that before the government deprives a person of a liberty or property interest, the person must be apprised of adverse evidence and given a reasonable opportunity to rebut the adverse evidence.[17]

Similarly, where guidelines exist for assessing penalties or denying benefits (as there are when a consular officer makes a decision to exclude a person from the United States), the government must actually consider the relevant evidence in applying those guidelines. See *Abourezk*, 785 F.2d at 1051 (noting

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[17] As the Court stated in *Greene v. McElroy*, "[c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." 360 U.S. 474, 496 (1959); *see also Bowman Transp. v. Arkansas Best Freight Sys.*, 419 U.S. 281, 288, n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.")

"thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power" and concluding that the "statutory language thus channels the Secretary of State's discretion and the constraints Congress imposed are judicially enforceable").

Indeed, the regulations governing the review and denial of a visa application provide a process for an applicant to learn the reason for a refusal and ascertain whether there is a way such reason can be overcome with the submission of additional evidence. 22 C.F.R. § 42.81(b) ("The consular officer shall inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available.")

Thus, in order to comport with Due Process for protected constitutional interests, a decision that denies an applicant the opportunity to enter the United States requires the consular officer to (1) provide notice of the adverse evidence (taking appropriate account of national security concerns as explained below); (2) provide the applicant with an opportunity to respond to the adverse evidence; and (3) give actual consideration to any evidence that is offered. Ensuring that these basic requirements of due process are satisfied does not interfere with any governmental interest protected by the plenary power doctrine. Ultimately, the decision to grant or deny the visa remains with the consular officers, who may exercise their discretion reasonably with respect to individuals whom they have reason to believe pose a danger to the community or to security.

E. *Mandel's* "Facially Legitimate and Bona Fide Reason" Requirement is Consistent with 8 U.S.C. § 1182(b)(3)

The limited judicial review of consular visa denials permitted by *Mandel* is not in any way inconsistent with 8 U.S.C. § 1182(b)(3), which allows the decision-maker in certain cases to withhold evidence on which it relies from the applicant. Section 1182(b)(3) does not bar the disclosure of an explanation either to a court for purposes of limited *Mandel* review, or to other persons challenging a visa denial. Instead, § 1182(b)(3) provides that, unlike other grounds of inadmissibility, the decision-maker need not "state the determination" for its decision under § 1182(a)(2) or § 1182(a)(3) through a written decision provided to the inadmissible individual. A requirement that the decision-maker provide some information—a facially legitimate and bona fide reason for its decision, with an opportunity for the record to be supplemented in response—does not interfere with the government's right to withhold a full explanation of its decision in order to protect valid national security concerns. Indeed, as the court below recognized, such information is often revealed to the applicant, even in cases involving §§ 1182(a)(2) or (a)(3). *Din v. Kerry*, 718 F.3d at 864-65.[18] Because the principles described above supporting judicial review still apply, and because the limited disclosure required to facilitate that review need not jeopardize the government's legitimate security or law enforcement

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[18] Indeed, as the court below also recognized, the Department of State Foreign Affairs Manual recognizes that standard written notices will still be provided in 1182(a)(2) and (3) cases unless otherwise authorized. 9 Foreign Affairs Manual 42.81 N2.

concerns, § 1182(b)(3) should not be interpreted as an exception to the requirement of a facially legitimate and bona fide reason for the decision.

First, to the extent that the protected liberty interests of a U.S. citizen lie behind a *Mandel* challenge, a statute preventing the court from determining whether the government had a facially legitimate and bona fide reason for impinging on those interests would raise serious constitutional questions. This Court has consistently interpreted immigration statutes so as to avoid raising such questions. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (concluding that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions" and noting that "where an alternative interpretation of the statute is fairly possible ... we are obligated to construe the statute to avoid such problems") (citations omitted); *Zadvydas v. Davis*, 533 U.S. 678, 680 (2001) (construing statute to avoid constitutional invalidation); *see also* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1380-1383 (1953). The nature of the constitutional rights at stake in consular cases is beyond the scope of this brief, though courts have recognized that significant Constitutional interests are often at stake. *Am. Acad.*, 573 F.3d at 125 (First Amendment); *Bustamante*, 531 F.3d at 1062, (marriage and family life). When constitutional liberty interests are at issue, a U.S. citizen is entitled to at least minimal judicial review. A statutory provision aimed solely at limiting obligatory disclosure to a non-citizen

should not be read to preclude the minimal disclosure required under the *Mandel* standard.

Second, irrespective of the disclosure required to be provided an individual applicant, the court has an obligation to ensure that the agency is acting within the scope of Congress' authority. *See, e.g. Abourezk*, 785 F.2d at 1061 (in the context of consular visa decisions, it is the duty of the courts to say where the statutory boundaries lie). Without such review, there is no rule of law. *See Judulang v. Holder*, 132 S. Ct. 476, 484 (2011) (in the context of discretionary immigration decisions, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking"); R. Fallon, *On Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916, 938 (1988) ("The underlying constitutional conception is that wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary.")

Thus, a court can demand a limited showing to ensure that the agency is not acting outside the boundary of its authority as established by Congress or acting in a wholly arbitrary or capricious manner. *E.g. Patel*, 134 F.3d at 931-32 (noting jurisdiction to hear challenges to the authority of the consul to take or fail to take an action). Given the limited nature of the showing required, and the ability to review affidavits or documents *in camera*, this review need not impinge on legitimate security concerns. *See, e.g.*, *Bustamante*, 531 F.3d at 1062 (upholding "facially legitimate reason" for denial of visa on the grounds that the Consulate

"had reason to believe" that applicant was a controlled substance trafficker based on information received from another agency); *Am. Acad.*, 573 F.3d at 126 (holding that "the identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason").

This limited review of whether officials were acting within their statutory authority is also consistent with how courts have protected due process rights in other immigration contexts, even when courts have stressed that they may not review the substance of the immigration decisions themselves. *St. Cyr*, 533 U.S. at 306-07 (noting that district courts traditionally reviewed immigration-related legal determinations through habeas corpus and "regularly answered questions of law that arose in the context of discretionary relief"); *Gegiow*, 239 U.S. at 9 (recognizing that "[t]he conclusiveness of the decisions of immigration officers" was limited to questions of fact).

Such review would also permit consistent interpretation of the key statutory provision. Section 1182(b) applies not only to consular visa decisions but also to individuals who are in the United States applying for adjustment of status. 8 U.S.C. § 1182(b)(1). In general, § 1182(b)(1) requires the decision-maker to provide applicants (including applicants for adjustment of status) with the reasons for an adverse decision. Section 1182(b)(3) states that the full explanation need not be given to persons

inadmissible under § 1182(a)(2) or (a)(3). However, it is well established that individuals in the United States applying for discretionary relief (including adjustment of status) are entitled to minimal procedural protections against arbitrary removal. *See, e.g.*, *Judulang*, 132 S. Ct. at 485, (noting that policies regarding discretionary relief "must be based on non-arbitrary, relevant factors"); *Samirah*, 627 F.3d at 658, ("Advance parole entitled him to return to the United States for the sole purpose of pressing his application for adjustment of status. By refusing to grant him a visa, the government is arbitrarily preventing him from exercising the right granted to him by the advance-parole regulation."); *see also Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) ("this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law ....'"). Thus, § 1182(b)(3) cannot be interpreted to prohibit courts reviewing adjustment-of-status applications from requiring an explanation sufficient to allow for judicial review. *Cf. Delgado v. Holder*, 648 F.3d 1095, 1107-08 (9th Cir. 2011) (en banc) ("Without knowing the basis of the Board's decision, we cannot conduct a meaningful review"). Given the need for such review for non-citizens in the context of adjustment of status applications, § 1182(b)(3) must be interpreted to accommodate otherwise permissible *Mandel* review of consular decisions in order to provide consistent treatment of the same statutory language. *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one").

Similarly, this interpretation of § 1182(b)(3) is consistent with other statutory provisions that allow an applicant to rebut certain grounds of inadmissibility under § 1182(a)(3). For example, § 1182(a)(3)(B) provides for inadmissibility of an applicant who is a member of a terrorist organization, § 1182(a)(3)(B)(i)(VI), has solicited funds for a terrorist organization, § 1182(a)(3)(B)(iv)(IV), has recruited individuals to join such an organization, § 1182(a)(3)(B)(iv)(V), or has otherwise provided material support, § 1182(a)(3)(B)(iv)(VI). Each of these provisions expressly provides that it does not apply if an applicant presents "clear and convincing evidence" that he or she "did not know, and should not reasonably have known" that the relevant organization was a terrorist organization.

In addition, State Department regulations impose an independent duty to supply reasons to a visa applicant, and those regulations, unlike the statute, contain no exception for § 1182(a)(3) cases.[19] The regulations provide that an applicant has the right to contest inadmissibility under certain provisions of § 1182(a)(3). Consular officers who deny a visa application must "inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative

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[19] The State Department's decision to require consular officers to disclose the reasons for visa denials even in cases where the statute may not expressly require disclosure is not *ultra vires*, because even the most expansive interpretation of § 1182(b)(3) would not *prohibit* the State Department from providing reasons in § 1182(a)(3) cases.

relief is available." 22 C.F.R. § 42.81(b); *see also id.* ("If the ground of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates an intention to submit such evidence, all documents may, with the consent of the alien, be retained in the consular files for a period not to exceed one year."). These regulations contain no exception for visas denied on national security or criminal grounds.

If review for a "facially legitimate and bona fide" reason under *Mandel* could be satisfied merely by citing § 1182(b)(3)(B) – without providing the specific provision under which the official believes the alien inadmissible or even an assertion that facts exist to support that belief – then it would, as a practical matter, prevent applicants who are entitled to offer evidence rebutting the grounds of their inadmissibility from doing so. *Cf. St. Cyr*, 533 U.S. at 307 (observing that "courts [have] recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand," and that legal errors resulting in denial of an alien's right to consideration for discretionary relief are subject to judicial review). A consular official's reason for denial cannot be facially legitimate and bona fide if it prevents applicants and their U.S. citizen family members from providing information or pursuing relief when they are legally entitled to do so.

CONCLUSION

The doctrine of absolute consular non-reviewability has never had any basis in case law. To the contrary, this Court's case law allows for meaningful judicial review of consular decisions. Such review – including at least review to ensure that the consular officer

follows the governing statutes and regulations, that there is some factual basis for findings made by the consular office, and that fundamentally fair procedures are used – is essential to ensure that the laws passed by Congress are followed.

Respectfully submitted.

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APPENDIX

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APPENDIX 1

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

JOHN F. KERRY,
SECRETARY OF STATE, ET AL.,
Petitioners,

v.

FAUZIA DIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Amici address the following question:

Whether the likelihood of error in the resolution of visa applications by consular officers warrants the provision of at least limited judicial review of such decisions.

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INTEREST OF THE *AMICI CURIAE*

Amicus National Immigrant Justice Center (NIJC) is a non-profit agency that represents immigrants and asylum-seekers. Together with over 1000 attorneys who co-counsel with NIJC on a pro bono basis, NIJC represents thousands of immigrants and asylum-seekers annually. NIJC has represented several clients who have been alleged to fall within the terrorism bar, including one client denied a visa to unite with his U.S. citizen wife. NIJC also represents hundreds of other individuals seeking visas or admission to the United States who are affected by the lack of effective review over consular decisions.[1]

Amicus American Immigration Lawyers Association (AILA) is a national organization comprised of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

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[1] Pursuant to Rule 37.6 of the rules of this Court, *amici* affirm that no counsel for a party authorized this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent and other *amici* show that respondent has a constitutionally protected interest in seeking unification with her spouse in this country. Assuming that to be so, the inquiry that determines whether procedural safeguards must be provided to prevent the wrongful deprivation of that right is familiar: the Court must "consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). See also *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 530 (2004); *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In undertaking this balance, the government focuses entirely on *its* side of the equation, addressing in some detail its interest in precluding what it describes as "judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission to the United States" (U.S. Br. 34), including "national-security and foreign-policy interests." *Id.* at 46. See *id.* at 46-51. We do not minimize the significance of those concerns. But "[i]t is beyond question that substantial interests lie on both sides of the scale in this case" (*Hamdi*, 542 U.S. at 529); there are profoundly important interests in marital and family integrity, described by respondent and other *amici* but ignored by the government, on the private side of the balance. In these circumstances, the risk of error and the value of procedural safeguards take on decisive importance: "The *Mathews* calculus * * * contemplates a judicious bal-

ancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest * * * and the 'probable value, if any, of additional or substitute procedural safeguards.'" *Ibid.* (quoting *Mathews*, 424 U.S. at 335).

That consideration is our focus in this brief. Although the government has nothing at all to say on the point, there is in fact no doubt that consular officials frequently make dispositive errors, both legal and factual in nature, when resolving visa applications. It could hardly be otherwise. Many of the governing statutory provisions are vague and broad; resolving visa applications may require consular officials (often non-attorneys) to make complex legal decisions; and decisions must be made without the structural advantages that help courts decide matters correctly. That these officials—however competent and well intentioned they may be—often err cannot be gainsaid: such errors have been well documented, as has been the reality that judicial review can provide a valuable and essential check on official mistakes that can have shattering consequences on the lives of visa applicants and their families in this country. In particular:

1. Although this case arises in the context of an unspecified allegation of some kind of support for terrorism, the rule sought by the government would govern admissibility decisions generally. Yet the necessity and value of judicial review of admissibility decisions is demonstrated by the longstanding history of federal judicial review of the admissibility of aliens already present in the United States. Courts frequently review such admissibility decisions for legal error, and then identify and correct errors committed by immigration authorities. Reviews have

found that a variety of considerations, including simple misunderstandings, language deficiencies, inadequate training, the complex nature of immigration law, and occasional instances of personal prejudice, lead government officials to make mistakes—mistakes that courts sometimes label "glaring."

Moreover, courts often find that even knowledgeable immigration officials err (in the domestic context) when applying exactly the same substantive legal standards that govern the review of visa applications. The experience of judicial review in these contexts shows that courts are well equipped to address the governing legal and factual questions—and suggests that it makes no sense for a question that *is* subject to judicial review when it arises in an affirmative application for an immigration benefit filed within the United States, or defensively in a removal setting, *not* to be subject to such review when it arises in the context of a visa denial. In these circumstances, the balance of interests militates strongly in favor of judicial review of the denial of visa applications by consular officers.

2. The governing statutory terms are written in vague and convoluted terms and have been implemented by the Departments of State and Homeland Security in a haphazard manner that makes excessively broad and inconsistent application inevitable. A person may be denied admission to the United States for having engaged in "terrorist activity" or being a member of a "terrorist organization." "Terrorist activity" may include essentially any act of violence that is not undertaken for personal monetary gain, while "engag[ing] in terrorist activity" includes providing "material support" to a terrorist organization. A terrorist organization, meanwhile, may in-

clude any group of two or more people, whether organized or not, that engages in, or has a subgroup that engages in, "terrorist activity." *Any* individual government adjudicator may determine on a case-by-case basis that even an unorganized group of two or more people is a terrorist organization, and the government does not publish a complete list of the organizations it has placed in that category.

As a consequence, visa applicants may not know that they were associated with groups that a consular officer deemed to be terrorist organizations, and will have no way to challenge such a determination, or seek an exemption therefrom—even though the lack of clarity in the controlling terms and the unstructured nature of the government's decision-making process make occasional errors likely. And the problem is particularly acute when the visa applicant comes from a jurisdiction where conflict is endemic and governmental authority uncertain.

The utility of review of visa denials by consular officers is demonstrated by the review that is now available of the same legal issues when they arise in the removal context. In the latter setting, the terrorism admissibility bar has frequently been alleged in error. Agency officials may err in determining that particular entities are terrorist organizations, and they may err in finding that particular non-citizens engaged in terrorist activities. *Amici* offer a host of examples to illustrate this point. Absent at least limited judicial review, manifest injustice inevitably will result—particularly in circumstances, like those in this case, where a consular official explains the denial of a visa application by offering only a bald citation to a broad and multi-faceted statutory provision.

ARGUMENT

The government's submission minimizes, or disregards entirely, considerations that should be central to the Court's analysis. It would be anomalous *not* to allow judicial review of visa decisions that affect the substantial rights of U.S. citizens. And the demonstrated frequency of errors committed by consular officers and other government officials in the admissibility context shows beyond dispute the need for such review. The discussion below addresses these points in turn.

I. Consular Decisions, Like Other Agency Decisions, Should Be Reviewed For Legal, Procedural, And Factual Error.

The general statutory background that governs here is described by respondents. Briefly, under the Immigration and Nationality Act (INA), a noncitizen generally may not be admitted to the United States without having been issued a visa by a consular officer in the Department of State. 8 U.S.C. §§ 1181(a), 1201(a)(1). The statute provides that the officer is to deny a visa when "it appears to the consular officer" that "such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the noncitizen is ineligible." 8 U.S.C. § 1201(g). This consular determination must be made within the bounds prescribed by law: "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa." 22 C.F.R. § 40.6.

This case involves a consular officer's invocation of the INA's "terrorist-related inadmissibility grounds" (TRIG), which were intended to bar terrorists and their supporters from entering the United States. But the government's argument goes much further: it contends not only that judicial review of TRIG determinations made abroad is barred, but also that the Court should countenance a sweeping exclusion of *all* consular decisions from judicial review. This Court, however, has never held that consular decisions may be completely shielded from judicial review, and such a holding would not conform to modern principles of administrative law. *Amici* address TRIG-specific issues below, but submit that the holding urged by the government would sweep in a host of legal and procedural issues that are well within the institutional competence of federal courts to resolve—and that they *do* routinely resolve where the non-citizen is present in the United States.

A. Judicial review involving individuals abroad is not categorically precluded by the Court's case law.

At the outset, judicial review is not precluded merely because the visa applicant has not made an entry into the United States. Even as to noncitizens considered legally to be outside our borders, broad judicial review over questions of law has been permitted for a century via habeas corpus. *Gegiow* v. *Uhl*, 239 U.S. 3, 9-10 (1915). In addition, although the Administrative Procedures Act (APA) was displaced by statute as to review of removal orders (*Foti* v. *INS*, 375 U.S. 217, 225-226 (1963))—such orders are now reviewed under the Hobbs Act—the APA continues to govern challenges to other immigration-related orders. See, *e.g.*, *Williams* v. *Sec'y, U.S. Dep't*

of Homeland Sec., 741 F.3d 1228, 1231 (11th Cir. 2014) (Adjustment of Status); *Neang Chea Taing* v. *Napolitano*, 567 F.3d 19, 22 (1st Cir. 2009) (visa petition); *Ayanbadejo* v. *Chertoff*, 517 F.3d 273, 277-278 (5th Cir. 2008) (per curiam) (same). Indeed, this Court has permitted APA review of immigration-related decisions affecting individuals abroad, at least as to an individual claiming U.S. citizenship. *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962) ("the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions * * * in the absence of clear and convincing evidence that Congress so intended") (citing *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *We Shung*, 352 U. S. 180 (1956)). It is not obvious why the U.S. citizen in this case should not occupy a similar legal position to that of the U.S. citizen in *Cort*.

Moreover, precisely the same questions that arise in the consular context are subject to litigation in cases arising domestically in removal proceedings or actions in district court. It would be anomalous to render an agency error irremediable, leaving a U.S. citizen family member without recourse, simply because the process occurs abroad. Nothing in the APA or the INA supports such a result.

B. Review of agency decisions regarding admissibility illustrates federal-court competence to resolve those issues and the importance of that authority.

In fact, inadmissibility issues frequently arise in removal proceedings, where they have generated a substantial body of case law. For instance, one ground of inadmissibility—which often affects eligibility for relief from removal—is the commission of a

crime of "moral turpitude." 8 U.S.C. § 1227(a)(2)(A). Determining whether a given offense qualifies as such a crime may require application of an ambiguous definition and resolution of complex legal and factual questions. See Brian C. Harms, *Redefining "Crimes of Moral Turpitude: A Proposal to Congress"*, 15 Geo. Immigr. L.J. 259 (2001). Federal courts have been reviewing moral turpitude issues for over a century. *See, e.g.*, *United States ex rel. Mylius* v. *Uhl*, 210 F. 860, 863 (2d Cir. 1914).

Courts frequently find that immigration authorities, immigration judges, and the BIA made serious errors in their application of the moral turpitude standard: For a non-exhaustive list of recent cases where a court of appeals reversed the BIA or immigration judge's determination as to whether a noncitizen had committed a crime of moral turpitude, see *Mejia* v. *Holder*, 756 F.3d 64 (1st Cir. 2014); *Mahn* v. *Att'y Gen. of U.S.*, 767 F.3d 170 (3d Cir. 2014); *Castrijon-Garcia* v. *Holder*, 704 F.3d 1205 (9th Cir. 2013); *Prudencio* v. *Holder*, 669 F.3d 472 (4th Cir. 2012); *Robles-Urrea* v. *Holder*, 678 F.3d 702 (9th Cir. 2012); *Nunez* v. *Holder*, 594 F.3d 1124 (9th Cir. 2010); *Saavedra-Figueroa* v. *Holder*, 625 F.3d 621, (9th Cir. 2010); *Jean-Louis* v. *Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009); *Saqr* v. *Holder*, 580 F.3d 414 (6th Cir. 2009); *Galeana-Mendoza* v. *Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Partyka* v. *Att'y Gen. of U.S.*, 417 F.3d 408 (3d Cir. 2005); *Fernandez-Ruiz* v. *Gonzales*, 468 F.3d 1159 (9th Cir. 2006); *Reyes-Morales* v. *Gonzales* 435 F.3d 937 (8th Cir. 2006); *Gill* v. *INS*, 420 F.3d 82 (2d. Cir, 2005); *Hernandez Martinez* v. *Ashcroft*, 343 F.3d 1075 (9th Cir. 2003).

Exactly the same questions arise when a consular officer determines whether to issue a visa, as the

same "crime involving moral turpitude" standard serves as a bar in that context. See 8 U.S.C. § 1182-(a)(2)(A)(i). Yet under the government's theory of this case, if two adjudicators make the same legal error regarding the same offense, the legal error made abroad is insulated from all review. This makes no sense: the federal courts are just as capable of adjudicating the legal claims of those two individuals, and the fact that one claim arises abroad does not affect the substance of the claim in any respect.

This is not unique to the turpitude context. A host of admissibility issues come before the federal courts,[2] all of which also may arise in the consular context, since the same admissibility statute applies in both cases. In this setting, the "strong presumption in favor of judicial review of administrative action" (*INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001)) is reinforced by the longstanding reviewability of the same legal issues for individuals in substantially the same constitutional posture as family-based visa applicants at consulates abroad.

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[2] *E.g.*, *Sandoval* v. *Holder*, 641 F.3d 982, 986-989 (8th Cir. 2011) (considering application of permanent inadmissibility ground at 8 U.S.C. § 1182(a)(6)(C)(II) to a minor); *Husic* v. *Holder*, No. 14-607, 2015 WL 106359, at *5 (2d Cir. Jan. 8, 2015) (joining seven other circuits in rejecting the Board's decision in *In re Koljenovic*, 25 I. & N. Dec. 219 (B.I.A.2010), as to the admissibility waiver at 8 U.S.C. § 1182(h)); *Ortiz-Bouchet* v. *U.S. Att'y Gen.*, 714 F.3d 1353, 1356-1357 (11th Cir. 2013) (per curiam) (finding error in agency admissibility determinations under 8 U.S.C. §§ 1182(a)(6)(C)(i), 1182(a)-(9)(B)).

II. Inadmissibility Grounds, Including Those Related To Terrorism, Are Susceptible To Erroneous Application.

As we have shown, the courts are competent to, and frequently do, address the sorts of issues that arise in the consular visa application process. And as we show below, the need for such review is acute: errors occur frequently in this context, and judicial oversight is vital in correcting the wrongful denial of a visa, preventing the unjust and permanent separation of applicants from their U.S. citizen families.

A. Consular officers frequently err.

As a general matter, institutional considerations make some number of consular errors inevitable. Due to limited time and resources, simple misunderstandings, language deficiencies, inadequate training, and the complicated nature of immigration law, consular officers commit factual and legal errors every day. Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 Geo. Immigr. L.J. 113 (2010); see James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 16-17 (1991). Many personal factors—including tenure of service, individual background, and career objectives—influence a consular officer's exercise of discretion during visa determinations, as reflected by dramatic differences in the rates of visa denial by different officers. Kim Anderson & David Gifford, *Consular Discretion in the Immigrant Visa-Issuing Process,* 16 San Diego L. Rev. 87 (1978). And although we do not question the dedication and good faith of most consular officers, the unfortunate reality is that some have relied on racial

and economic stereotyping when denying visas;[3] other have used openly racist criteria in rendering visa decisions;[4] and still others have simply failed to follow instructions. Indeed, an extensive study "concluded that most consuls did not follow the guidelines for visa adjudication set forth in the State Department's Foreign Affairs Manual." Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 How. L.J. 237, 255 (1994).

The proposition that some judicial review in the consular context would find and correct errors made by consular officers is not a matter of speculation; courts make such findings every day in closely related settings. For instance, in circumstances where domestic immigration authorities have sought the assistance of consular officials in vetting asylum claims, courts of appeals have determined, with some regularity, that consular submissions were "glaringly deficient" (*Banat* v. *Holder*, 557 F.3d 886, 893 (8th Cir. 2009)), "markedly insufficient" (*Anim* v. *Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008)), "insufficiently detailed" (*Lin* v. *Dep't of Justice*, 459 F.3d 255, 270 (2d Cir. 2006)), "highly unreliable" (*Alexandrov* v. *Gonzales*, 442 F.3d 395, 405 (6th Cir. 2006)),

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[3] Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295, 343 n.279 (2002).

[4] *Olsen* v. *Albright*, 990 F. Supp. 31 (D.D.C. 1997) (discussing the case of a consular officer who was fired for refusing to follow the consulate's racial visa eligibility policies). See also Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755, 762 (2000) (discussing how some consular offices have used openly racist criteria in visa decisions).

and "troubling" and "untrustworthy" (*Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 408, 411 (3d Cir. 2003)).

Courts also repeatedly have corrected instances where consular officials failed to follow legally mandated procedures. For example, in lawsuits challenging visa denials, subject matter jurisdiction exists to allow an applicant to seek a writ of mandamus to compel adjudication of an unreasonably delayed visa application. See *Ahmed* v. *DHS*, 328 F.3d 383, 388 (7th Cir. 2003); *Iddir* v. *INS*, 301 F.3d 492, 500 (7th Cir. 2002). In one such instance, a visa applicant waited for more than eight years before the court compelled the U.S. consulate to act on the pending application, holding that an eight-year delay on the part of consular officials was unreasonable. *Patel* v. *Reno*, 134 F.3d 929, 933 (9th Cir. 1997). See also, *e.g.*, *Singh* v. *Clinton*, 618 F.3d 1085, 1091-1092 (9th Cir. 2010) (finding failure to provide required notice of termination of a visa registration).

B. Government agencies often err in making terrorism determinations.

The general need for some judicial review of consular decisions is applicable, as well, in the context of terrorism-related decisions. Consular officers do not have unbounded discretion when acting on visa applications. As relevant here, the terrorism-related inadmissibility grounds are set by specific statutory terms. And because these terms are in significant respects confusing and indefinite, occasional error in their application can be expected.

1. The statutory definition of "terrorist activity" and "terrorist group" is broad and convoluted.

As noted, this case involves a consular officer's invocation of the INA's TRIG bar, which was intended to bar terrorists and their supporters from entering the United States. Section 1182 requires the exclusion of any person who, among other things, has engaged in "terrorist activity." 8 U.S.C. § 1182(a)(3)-(B)(i)(I). "Terrorist activity" is, in the experience of *amici*, most commonly applied to individuals found to have provided "material support" to a terrorist organization. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). A "terrorist organization," in turn, is defined to include not only organizations formally designated as such by the Secretary of State (see 8 U.S.C. § 1182(a)(3)(B)-(vi)(I), (II)), but also any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in [§ 1182(a)(3)(B)(iv)]." 8 U.S.C. § 1182(a)-(3)(B)(vi)(III). And the terrorist label is triggered by, among other things, "[t]he use of any * * * explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b). See *Khan* v. *Holder*, 584 F.3d 773, 777 (9th Cir. 2009).

So far as these undesignated terrorist organizations are concerned, the INA does not specify which government agency may categorize a group as terrorist in nature. *Khalfallah* v. *Holder*, No. 3:11-cv-414, 2011 WL 4839103, at *1 n.1 (N.D. Tex. Sep. 9, 2011). Nor does the statute detail either the process by which an agency should make such a finding or the

specific findings that must be made. *Ibid.* Such groups accordingly may be labeled "terrorist" on a "case-by-case basis" under designations that "arise and change over time," and such labels "may apply to individuals and activities not commonly thought to be associated with terrorism." USCIS, Terrorism-Related Inadmissibility Grounds, perma.cc/5HMJ-EP48. Thus, "[a]ny government adjudicator, such as a DHS asylum or refugee officer, a Service Center adjudicator, or an immigration judge, can determine on a case-by-case basis that a group" qualifies as a terrorist organization. Anwen Hughes, et al., *Combating the Terrorism Bars Before DHS and the Courts*, Immigration Practice Pointers 452 (2010-11). See 9 Foreign Affairs Manual 40.32 n2.8(a)(3) (State Department's Foreign Affairs Manual gives consular officers "a key role in determining whether an entity is an undesignated terrorist organization"). And compounding the uncertainty and indefinite nature of these designations, the government does not publish a list of "undesignated" terrorist organizations.

Against this background of loose statutory language and ad hoc government decision-making, it is unsurprising that the government's interpretation of "terrorist" and "terrorist organization" has become untethered both from those terms' common usage and the sense of the statutory text. The Department of Homeland Security has applied terms such as "terrorist organization" and "material" in a manner that sweeps in conduct that "no reasonable person would consider material support or terrorism." S. Hrg. 110-753, Hearing Before the Subcomm. on Human Rights and the Law of the Comm. on the Judiciary, The "Material Support" Bar: Denying Refuge to the Persecuted, 110th Cong., 1st Sess., 2 (Sept. 19, 2007) (statement of Sen. Durbin). Thus, as we show

below (at 19-24), the government has applied the bar to persons who, for example, were the victims of extortion by criminal groups, or who taught in a school that operated in an area administered by what the government characterized as a terrorist regime. As might be expected, the danger of such anomalous treatment is particularly acute when the applicant comes from an area where government authority is lax and armed conflict commonplace.[5]

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[5] Notably, the government's interpretation of terrorist organizations does not "distinguish between genuine terrorists and legitimate resistance groups." Hearing Before the House Subcomm. on Africa, Global, Human Rights and Int'l Ops., Comm. on Int'l Rel., Current Issues in U.S. Refugee Protection and Resettlement, 109th Cong., 2d Sess. 12 (May 10, 2006) (Rep. Smith). Although the government does not publish a full list of organizations determined to qualify as a terrorist organization, Human Rights First has compiled a partial list that includes: all Iraqi groups that fought against Saddam Hussein; all U.S.-supported Afghan groups that fought the Soviet invasion in the 1980s; opposition parties in Sudan that were forced to flee that country after the 1989 military coup; South Sudanese armed opposition movements that are now the ruling party of South Sudan; virtually all Ethiopian and Eritrean political parties; every group to have fought the military junta in Burma that was not exempted by specific legislation; any Iranian opposition group that used armed force after the 1979 Iranian revolution; and the MDC, the principal opposition group in Zimbabwe. These groups are not considered terrorist organizations by the U.S. government in any other context. Human Rights First, *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States* 4-5 (2009). This broad agency approach to the identification of terrorist organizations has led to the anomalous result that persons who served alongside U.S. soldiers or fought in U.S.-supported armed rebellions against totalitarian regimes may be treated as terrorists. See, *e.g.*, Ishaan

Against this background, it is not surprising that even DHS officials recognize that the material support bar has the "potential to sweep too broadly and to prevent us from providing immigration benefits to those who are deserving of them." S. Hrg. 110-753, at 7 (statement of Paul Rosenzweig, Deputy Ass. Sec'y for Policy, U.S. Dep't of Homeland Security); see also *In re S-K*, 23 I. & N. Dec. 936, 948 (B.I.A. 2006) (Osuna, J., concurring), *aff'd in part, vacated in part*, 24 I. & N. Dec. 475 (B.I.A. 2008).

2. *TRIG determinations may be legally or factually flawed.*

In this context of limited disclosure, individualized administrative decision-making, and the factual setting of a war-torn and lawless environment, it would be remarkable if errors did not occur in application of the TRIG bar. And in fact, TRIG decisions about admissibility sometimes are plainly contrary to congressional intent, wholly unreasonable, or clearly erroneous as a factual matter. Because the current application of the TRIG bar is so susceptible to error, oversight is necessary—and will produce fairer results for applicants and their relatives who are U.S. citizens.

In the discussion below, we describe the application of the TRIG bar by government officials outside the consular visa application process, in contexts such as asylum and removal. But precisely the same

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Tharoor, *A U.S.-designated Terrorist Group is Saving Yazidis and Battling the Islamic State*, Wash. Post, Aug. 11, 2014, perma.cc/S9QC-EL6Z; *Oryakhil* v. *DHS*, No. 13-cv-01738, Dkt. 31 (N.D. Ill. Nov. 15, 2013) (asylee found by DHS to have triggered terrorism bar by supporting the Northern Alliance against the Taliban), following *Oryakhil* v. *Mukasey*, 528 F.3d 993 (7th Cir. 2008)).

substantive legal standards govern in all of these settings—and the frequency of legal and factual error in one context leaves no doubt that such errors also occur, and could be corrected by judicial review, in the others.

To begin with, although "[d]eference to the political [b]ranches is at its zenith in matters of national security and foreign affairs" (see U.S. Br. 42, citing *Wayte* v. *United States*, 470 U.S. 598, 611-612 (1985)), the fact remains that there are governing legal standards that establish when the TRIG bar does, and does not, apply. And executive discretion, however desirable it may be in certain contexts as a matter of policy, extends "only as far as the statutory authority conferred by Congress"; "[i]t is the duty of the courts * * * to say where those statutory and constitutional boundaries lie." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061-1062 (D.C. Cir. 1986) (Ginsburg, J.) (remanding for a more "informed decision" by the district court on whether the State Department had exceeded its statutory authority); see also *Am. Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009) (observing that a plenary-power standard does not preclude ensuring that officials have "properly construed and applied" the statutes at issue). That need to introduce a modicum of process and oversight is pressing here.

First, one potential source of error is that an entity with which the applicant was somehow associated may have been improperly categorized as a terrorist organization. For example, for treatment as an undesignated terrorist organization to be appropriate, at least two questions must be addressed: (1) whether the organization is "a group of two or more individuals"; and (2) whether it engages in terrorist

activities. See 8 U.S.C. § 1182(a)(3)(B)(vi)(III). The answer to the first of these questions will sometimes be unclear, given the statute's failure to define the ambiguous word "group." And the answer to the second often will be doubtful. Indeed, some courts have identified designation as a "terrorist organization" where the assertion of "terrorist activities" was wholly unsupported.

In one case, the government's terrorist group designation rested on evidence that one member of the group had committed violent acts. See *Singh* v. *Wiles*, 747 F. Supp. 2d 1223, 1231-1232 (W.D. Wash. 2010). After the court reviewed the record, however, it became clear that the violent individual had acted either alone or with third-party support—and had, in any case, died before the *applicant's* association with the group began. *Id.* at 1232 ("The court's review of the administrative record and the relevant statutory framework leaves it convinced that there is no rational connection between the facts disclosed in the record and USCIS's determination that Damdami Taksal was a terrorist organization while Mr. Singh permitted its members to sleep at his temple.") There was, in short, no defensible reason either to assign terrorist group status to the group in question or to exclude the applicant on a TRIG basis. Accordingly, some terrorist designations, like the one challenged in *Singh*, may ultimately prove to be without any reasonable factual underpinnings at all.

Second, the non-citizen's actions may not in fact have supported the group. A non-citizen may be excluded if the government finds that he or she "engage[d] in terrorist activity," defined to include providing "material support" for that group. 8 U.S.C.

§ 1182(a)(3)(B)(iv)(VI).[6] But as with the terrorist group designations, the finding of material support is rife with opportunities for agency mistakes and misunderstandings. Under the government's current haphazard approach, almost any act could conceivably be construed as "material support"—even acts that no reasonable and impartial observer would characterize as supportive of terrorism.

The asylum application filed by Mohamed Daneshvar illustrates how even minimally intrusive judicial oversight can uncover error and overreach in the "material support" context. The BIA denied Daneshvar's asylum application, in part because the Board deemed him inadmissible for allegedly having solicited others in Iran to join the Mujahedin-e Khalq Organization (MEK), a terrorist group. *Daneshvar* v. *Ashcroft*, 355 F.3d 615, 619-621 (6th Cir. 2004). Daneshvar's involvement with MEK, however, was limited to selling the group's newspapers, at the age of sixteen, and he had discontinued his association with the group upon discovering its turn to violence. *Id.* at 619-620.

The Sixth Circuit enumerated several problems with the government's application of the "material support bar" to Daneshvar: MEK had not yet been designated a terrorist group at the time of Daneshvar's actions; the Board had not considered Daneshvar's testimony that he knew nothing of MEK's vi-

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[6] The statute specifically mentions, as examples of material support, providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

olent activities; and there was no evidence that Daneshvar himself had engaged in any terrorist acts. 355 F.3d at 628. "We would be hard-pressed," concluded the Sixth Circuit, "to classify any minor who sold newspapers for an organization that supported an armed revolt against a tyrannical monarch as a terrorist. To impute such political sophistication to a teenager * * * would amount to a manifest injustice."[7] *Ibid.* The Board's "factual and legal mistakes" were so significant as to overcome the court's default presumption of deference. *Id.* at 628-629.

There are numerous additional examples of similarly flawed TRIG findings that, on closer examination after an adversarial presentation, were corrected either on review or by the agency itself. These include[8]:

- The applicant, a doctor in the Democratic Republic of Congo who was beaten and whose wife was tortured and raped by government officials, was denied asylum on the ground that he made contributions and therefore provided material support to the Bundu Dia Kongo (BDK), characterized as a terrorist organization. But on review of the evidence and on hearing the applicant's tes-

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[7] As some of the examples described below illustrate, political and social revolutions often give rise to organizations like MEK, whose precise political and ideological commitments—and propensity for violent acts of terrorism—are not always clear from the outset of their existence.

[8] In light of the need for confidentiality in asylum proceedings and the sensitivity of allegations (even if unsupported) regarding terrorism, names and other identifying material are not included in the following examples. Specific information regarding the cases discussed is available from counsel for *amici*.

timony, the immigration judge and the BIA both concluded that, at the time the applicant made his contributions, he did not know and could not reasonably have known that the BDK engaged in violent acts. L--x--x--, Axxx-xxx-464 (B.I.A. Sept. 23, 2013) (unpublished).

- USCIS applied the material support bar to an applicant because he taught civilians in a school administered by the Eritrean People's Liberation Front (EPLF), which DHS treated as a terrorist organization. The immigration judge found that "teaching general education to civilians," including "subjects such as language, mathematics and science"—at a school "largely funded by international NGOs and government agencies, including the Red Cross, Oxfam, and USAID"—"does not constitute the type of 'support' contemplated by Congress." The judge also found that any support the applicant did provide the EPLF was not material and that, in any event, the applicant "did not know, and should not reasonably have known, that the EPLF was a terrorist organization."

- USCIS issued notices that the applicant, an individual of Palestinian descent, was inadmissible because the English translation of his handwritten Arabic asylum application indicated that he was associated with the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization. But evidence submitted by the applicant showed that the applicant had never supported or been affiliated with the PFLP and that the USCIS's contrary assertion was the product of a translation error; the asylum application in fact said "community group" and made no reference to the PFLP at all. In response to this evidence,

USCIS approved the application for adjustment of status.

- DHS sought to deny permanent residence status to and to remove Abdul Hamid on material support grounds. After Hamid presented evidence and expert witness testimony that he had made payments, under threat of death, to a group of mercenary "thugs" in Pakistan, which the U.S. government had subsequently linked to a larger network of violent terrorists, the immigration judge rejected the government's submission and granted Hamid's application for permanent residence. Benach Ragland LLP, *BR–Client of the Month–September 2014*, perma.cc/E3D7-YDDN.

- Asserting the material support bar, DHS opposed the asylum application of a Pakistani citizen who, at the age of sixteen, had joined a group that advanced the rights of Pakistanis of Indian descent. In a decision affirmed by the BIA, the immigration judge rejected the government's position and held the applicant eligible for asylum, noting that the applicant credibly testified "that he has never known a member of [the groups with which he was associated] to suggest or encourage harming others and that he would have immediately renounced his membership if he had learned that either organization used violence to advance its agenda." Based on this and other evidence, the judge determined that the applicant "should not reasonably have known that [the organizations] were terrorist organizations."

- DHS opposed the asylum application of K-P- on material support grounds. After multiple hearings and extensive briefing, the immigration judge found that K-P- had provided money and

jewelry to armed guerillas in Nepal on threat of death, and that she was the victim of a crime rather than a supporter of terrorism.

- In *FH-T* v. *Holder*, 723 F.3d 833 (7th Cir. 2013), cert. denied, 135 S. Ct. 55 (2014), the applicant, a citizen of Eritrea, was denied asylum on the ground that he provided material support to the EPLF, an organization that he joined when he was approximately fifteen years old and sought to leave after two days, but for which he was forced to work in a noncombat role for a period of many years. The court of appeals declined to address for failure to exhaust the applicant's argument that he was unaware that the EPLF—which was fighting a lengthy war with Ethiopia—was engaging in unlawful violence, but noted that, had the argument been properly exhausted, "our finding may well have been different." 723 F.3d at 841.

C. None of these legal flaws would be discoverable if the government offers no intelligible explanation for the visa denial.

As these examples show, errors demonstrably and inevitably are made in the TRIG context. But none of the errors discussed above would have been either brought to light or corrected absent (i) at least some limited disclosure of the TRIG rationale beyond the mere citation of the statutory section deemed relevant by the government; (ii) an opportunity for the applicant to address the government's reasoning and evidence; and (iii) the availability of review by an impartial magistrate—all of which the government would categorically withhold in the circumstances of this case.

In fact, these examples provide graphic support for the proposition that insufficient process creates an acute risk of "erroneous deprivation of a citizen's liberty"—particularly in contexts where, as here, mistakes are relatively common. *Hamdi*, 542 U.S. at 530. After all, a fundamental requirement of due process is that a person faced with the deprivation of liberty or property be offered the opportunity to hear and address the evidence against them. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (discussing the constitutional importance of the "opportunity to be heard * * * at a meaningful time and in a meaningful manner"). Even when the judicial role is limited and deferential, as it may be in the national security context, judicial oversight and the fundamentals of due process remain critical. See *Hamdi*, 542 U.S. at 530. Especially when the government provides no reason for an exclusion decision aside from a bare citation to a statute like Section 1182(a)(3)(B)—a capacious and multifaceted provision—denial of all other process leaves applicants with no means to assess and challenge the government's resolution of the important legal questions discussed in this section.

The Ninth Circuit, below, properly took note of this problem. The government, the court observed, had provided "no factual allegations that would allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied." Pet. App. 9a. In previous cases, the government had presented an intelligible reason for exclusion and used the statute to "g[i]ve the reason legitimacy." *Id.* at 10a. In contrast, the record in this case is "void" of any such facially legitimate reasons. *Id.* at 11a (citing *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1060-1063 (9th Cir. 2008), and *Adams* v. *Baker*, 909 F.2d 643, 649

(1st Cir. 1990)). Moreover, some subsections of the statute confer an explicit right to attempt to present exculpatory evidence; citing the entire statute as the reason for exclusion effectively erases this right. *Id.* at 863. Proper application of the balance required by due process principles precludes such a result.[9]

In sum, the type and frequency of errors that may be made in the visa application process—coupled with the courts' historic and effective role in correcting such errors—demonstrate the necessity of ju-

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[9] The government relies heavily on *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950) and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). But the government's uncritical citation to those cases (which were not litigated by U.S. citizens) omits important facts about each. After a public outcry (and, in Knauff's case, a stay of removal issued by Justice Jackson), both Knauff and Mezei were granted hearings before the immigration courts. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Kauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 955-964 (1995). Indeed, Knauff prevailed in her case: the BIA found the allegations against her unsupported and ordered her admitted to the United Stats for permanent residence—a finding later approved by the Attorney General. *Ibid.* And one of the two witnesses against Mezei was a professional witness who had presented perjured testimony in other cases. See *Communist Party* v. *Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956). Although Mezei did not ultimately prevail before the BIA, the BIA did find that he played only a minor role, and he was ultimately released from detention on immigration parole. Weisselberg, 143 U. Pa. L. Rev. at 983-984.

Both *Knauff* and *Mezei* are, of course, binding unless overruled by the Court—but the government now invites their expansion to a wholly different context. The history of those two cases—demonstrating the injustice that secret agency proceedings frequently entail—should give the Court pause before accepting that invitation.

dicial review over consular visa determinations in cases like this one. Experience shows that "'the risk of an erroneous deprivation' of the private interest" in the absence of any judicial process is exceedingly high, as is "the 'probable value'" of even limited judicial review. *Hamdi*, 542 U.S. at 529. In these circumstances, "judicious balancing of these concerns" mandates the availability of judicial review. *Ibid.*

Congress responded to these concerns many decades ago when it enacted the APA, which codifies a presumption of reviewability of agency actions. No statute precludes that review here, and the presumption of reviewability is only strengthened by the fundamental familial rights implicated by family-based visa denials. What the Constitution would require and fundamental fairness would enjoin has already been decreed by Congress. The Court should give effect to that determination here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, ET AL.,
Petitioners,

v.

FAUZIA DIN,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL JUSTICE FOR OUR NEIGHBORS; REFUGEE AND IMMIGRATION MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST); COUNCIL ON AMERICAN-ISLAMIC RELATIONS; MENNONITE CENTRAL COMMITTEE; UNITED SIKHS; FRANCISCAN ACTION NETWORK; CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, OFFICE OF SOCIAL JUSTICE; AND COUNCIL OF ISLAMIC ORGANIZATIONS OF GREATER CHICAGO IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The diverse religious organizations that join this brief share a strong interest in ensuring that the federal immigration laws are interpreted and implemented in a manner that preserves and promotes marital and family unity, to the benefit of American families, communities, and society at large. Individual amici are described in the Appendix.

SUMMARY OF THE ARGUMENT

The fundamental rights to marry, and to marital and family unity, predate and are enshrined in the Fifth and Fourteenth Amendments' Due Process Clauses. Marriage and family form the basis of American society, and create individual, community, and societal benefits that are impossible to overstate. For these reasons, Congress has promoted marital and family unity in the nation's immigration laws, including the laws that govern a U.S. citizen's visa petition on behalf of a non-citizen spouse.

The government here proposes to eviscerate these longstanding rights and interests of U.S. citizens, as well as Congress's policy decisions. Specifically, the government asks the Court to allow it to deny visas to non-citizen spouses without *any* judicial review and, in certain circumstances, without *any* explanation whatsoever. Such sweeping license to break up

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

families on the government's unreviewable and unsubstantiated say-so would dramatically erode the rights of millions of U.S. citizens that both the Constitution and Congress have guaranteed, impair society's interest in marital and family unity, and contravene this Court's precedents. The Court should reject the government's untenable position and affirm the Ninth Circuit's judgment.

ARGUMENT

I. THE FUNDAMENTAL RIGHT TO MARITAL AND FAMILY UNITY IS EMBODIED IN FEDERAL IMMIGRATION LAW

A. Marital And Family Unity Is A Fundamental Right And Societal Value

"The integrity of the family unit has found protection in" our founding document, the Constitution itself. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Court has recognized a right to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and parents also have a liberty interest in their children's upbringing, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

This Court has placed special emphasis on the fundamental right to marriage. In at least twelve cases, the Court has "recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974).[2] This right encompasses not only entitle-

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[2] *See also Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888); *Meyer*, 262 U.S. at 399; *Skinner v. Oklahoma ex rel. Williamson*, 316

ment to legal protection and benefits reserved for married couples, but also the right to "express[] emotional support and public commitment." *Turner*, 482 U.S. at 95. It therefore entails the freedoms "to marry, establish a home, and bring up children." *Meyer*, 262 U.S. at 399.

"[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (plurality op.). The right reflects a "strong tradition" founded on "the history and culture of Western civilization" that "is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (family is "basic in the structure of our society"). Numerous historical sources confirm the importance of marriage and family in American tradition. *See, e.g.*, Noah Webster, *An Am. Dict. of the English Language* (1st ed. 1828) (noting purposes of "marriage"); William Blackstone, 1 *Commentaries* 422 (same).

Promoting marital and family stability, moreover, remains a modern goal. It is evident in a diverse array of modern federal legislation, ranging from the Family and Medical Leave Act (which was designed

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U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Loving*, 388 U.S. at 12; *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality op.); *Carey v. Pop. Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

to promote "the stability and economic security of families," 29 U.S.C. § 2601(b)(1)), to the Indian Child Welfare Act (which was passed "to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902). Current empirical sources confirm the ongoing importance of family stability for married couples, their children, and society as a whole. *See, e.g.*, Kristen Anderson Moore, et al., *Marriage From a Child's Perspective, Child Trends Res. Brief* 6 (June 2002) (hereinafter "Moore").

B. Federal Immigration Law Promotes Marital And Family Unity

Enacted in 1952 and amended many times since, the Immigration and Nationality Act (INA) creates a "comprehensive federal statutory scheme" that "set[s] the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully" here. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011). While these enactments have sought to ensure that the immigration laws are "enforced vigorously," Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384, that has never been Congress's *only* statutory objective. Rather, federal immigration law has traditionally strived to regulate immigration in a manner that promotes other important values, including marital and family unity.

Federal immigration law generally seeks to keep spouses—as well as parents and their children—together. Both modern provisions and provisions dating to the original INA underscore this "intention regarding the preservation of the family unit." H.R. Rep. No. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680; *see* H.R. Rep. No. 101-

723(I), at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6717 (referring to "family reunification" as "the cornerstone of U.S. immigration policy"); S. Rep. No. 89-748, at 13 (1965), *reprinted in* 1965 U.S.S.C.A.N. 3328, 3332 (describing "[r]eunification of families" as "the foremost consideration").

As numerous circuit courts of appeals have recognized, this important federal objective infuses myriad aspects of the immigration laws and their judicial interpretation. *See, e.g.*, *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) ("It is consistent with Congress's remedial purposes to interpret the statute's ambiguity in a manner that will keep families intact."); *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998) ("Various provisions of the INA reflect Congress's intent to prevent the unwarranted separation of parents from their children."); *Mufti v. Gonzales*, 174 F. App'x 303, 306 (6th Cir. 2006) ("Congress's intent is clear: family unification is one of the highest goals of our immigration law."); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The [INA] was intended to keep families together," and "should be construed in favor of family units.").

Entry. To begin with, Congress has long "felt that, in many circumstances, it [is] more important to unite families and preserve family ties than it [is] to enforce strictly' arbitrary numerical quotas on the number of immigrants that may enter this country. *I.N.S. v. Errico*, 385 U.S. 214, 220 (1966). Thus, Congress preserves the largest number of visas available each year for family members of U.S. citizens and permanent residents. *See* 8 U.S.C. § 1151(a), (c). Federal law generally places no cap on

the number of spouses, children, and parents of U.S. citizens that may enter, *id.* § 1151(b)(2)(A)(i), and allocates a substantial percentage of visas to family members of permanent residents, *id.* §§ 1151(a)(1), 1153(a).

In addition to this general "[p]reference allocation for family-sponsored immigrants," *id.* § 1153(a), federal law gives the Attorney General additional discretion "to assure family unity" in specific situations, *see, e.g.*, *id.* §§ 1157(c)(3), 1182(d)(11). With respect to an immigrant seeking adjustment of status to lawful permanent resident, for example, the Attorney General may take into account family unity by waiving otherwise applicable bars to admission. *See id.* § 1159(c); *see also id.* § 1182(a)(3)(D)(iv). Likewise, federal law allows the Attorney General to waive the bar against the admission of immigrants who have assisted other undocumented immigrants to enter, if they have assisted only a spouse, parent, or child. *Id.* § 1182(d)(11). "[F]amily unification [was] the motivation behind the creation of [these] waiver[s]." *Mufti*, 174 F. App'x at 306.

Removal. Family considerations also affect removal proceedings for immigrants already here. Federal law, for example, permits cancellation of removal for an undocumented immigrant if the removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child." 8 U.S.C. § 1229b(b)(1)(D). And while a lawfully admitted immigrant is removable if he assists in bringing an undocumented immigrant into the United States, the Attorney General may waive this provision if the lawfully admitted immigrant assisted only an imme-

diate family member such as a spouse. *Id.* § 1227(a)(1)(E)(iii).

The government also gives preferential consideration to family ties in its enforcement of the general removal provisions. "When weighing whether an exercise of prosecutorial discretion may be warranted" in a particular case, federal agents must consider such factors as "the person's . family relationships" and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent." John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency* 4 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (last visited Jan. 13, 2015). Family ties also count as an important discretionary factor when the executive determines whether it will grant asylum to an immigrant. *See, e.g., Huang v. I.N.S.*, 436 F.3d 89, 101 (2d Cir. 2006).

Immediate-Family Visa. In furtherance of its policy to promote marital and family unity, Congress has implemented special preferences and procedures for U.S. citizens to petition for visas on behalf of non-citizen spouses and other immediate family members. A U.S. citizen instigates the process by filing a petition with United States Citizenship and Immigration Services (USCIS) to obtain immediate-relative status for the alien spouse or family member. 8 U.S.C. § 1154(a)(1). USCIS "shall approve the petition" if it determines that "the facts stated in the petition are true." *Id.* § 1154(b). If USCIS denies the petition, the citizen may seek administrative reopening or reconsideration, *see* 8 C.F.R. § 103.5, or review of

the Board of Immigration Appeals, *see id.* §§ 103.3(a), 1003.1(b)(5), 1003.5(b).

Approval of an immediate-family petition triggers legal obligations and responsibilities in the citizen. Ordinarily, where the petition relates to a spouse of the citizen, the citizen is the "sponsor" who must "execute an affidavit of support" on the spouse's behalf. 8 U.S.C. § 1182(a)(4)(C)(2). An affidavit of support is a "legally enforceable" contract with the government. *Id.* § 1183a(a)(1)(B). By executing an affidavit of support, the citizen "agrees to provide support to maintain the sponsored alien at an annual income of not less than 125 percent of the Federal poverty line" and to reimburse any federal or state government entity "that provides any means-tested public benefit" to the alien "before the alien is naturalized as a citizen of the United States." *Id.* § 1183a(a)(1)–(2). A citizen who breaches the affidavit of support faces legal action for a host of remedies, including "specific performance and payment of legal fees and other costs of collection" incurred by a federal or state government entity. *Id.* § 1183a(c).

The *only* reason for a citizen to file an immediate-family petition is to facilitate the alien's application for a visa. *See id.* § 1154(a)(1)(A)(i). Indeed, the alien becomes eligible to apply for an immediate-family visa only after the citizen's immediate-family petition has been granted. *See id.* §§ 1201(a), 1202(a), 1202(e). Congress has placed no limit on the number of spouses of U.S. citizens who may be awarded visas and enter the United States. *See id.* § 1151(b)(2)(A)(i).

II. THE GOVERNMENT'S POSITION WOULD ERODE MARITAL AND FAMILY UNITY FOR THE LARGE AND GROWING NUMBER OF CROSS-BORDER FAMILIES

The government readily concedes that, under the position it asks the Court to embrace, U.S. citizens would be deprived of the opportunity to "live in this country" with their non-citizen spouses without *any* judicial review and, in cases of alleged criminal activity, without *any* explanation whatsoever. Pet. Br. 24. But the government offers no coherent reason why the Court should depart from the Constitution and an animating policy of federal immigration law and countenance this result. To the contrary, the government ignores that its approach would strip the millions of U.S. citizens in mixed-nativity families of their Constitutional and statutory rights, and deprive many married couples and families of the ability to live together anywhere. The Court should reject the government's invitation to embrace this erosion of marital and family unity, and affirm the Ninth Circuit's decision.

1. The erosion of marital and family unity that could result from the government's proposed rule is simply breathtaking in scope. By depriving married couples and families of the right to live together in this country merely on the government's unreviewable and unsubstantiated say-so, the government would undermine the marital and family unity that the INA was designed to promote. *See supra* Part I. The government's approach therefore threatens to hasten the demise of unified couples and families that form the foundation of American society as en-

shrined in the Constitution and this Court's jurisprudence. *See supra* Part I.A.

Millions of U.S. citizens and their families would see their rights diminished under the government's far-reaching position. The recent growth in globalization has ushered in a concomitant explosion in the number of marriages between U.S. citizens and non-citizens. Every year, well over 100,000 non-citizens immigrate to the United States through marriage to a U.S. citizen. *See* 2013 Yearbook Of Immigration Statistics, *available at* http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents (last visited Jan. 13, 2015). According to Census Department data, over four million couples residing in the United States are of "mixed" nativity with at least one spouse who was born outside the United States, and over 1.5 million couples involve a native-born U.S. citizen married to a non-citizen. Luke J. Larsen & Nathan P. Walters, Married-Couple Households by Nativity Status: 2011, ACSBR/11–16, at 2 (Sept. 2013). Another 4.4 million couples residing in the United States include a naturalized citizen and a noncitizen. *See id.* 3.

Congress has granted these 5.9 million couples within the United States—as well as the untold number of couples who reside abroad and are made up of a U.S. citizen and non-citizen—the right to file for immediate-family visas. Yet the government's proposed rule would allow it to deny those visas without any judicial review or explanation, despite the far-reaching and detrimental consequences of each such denial on U.S. citizens, their families, and society at large.

2. The government's suggestion that its proposed

rule would cause only minor disruptions to couples and families because it prohibits spouses only from residing together in the United States but not "anywhere [else] in the world," Pet. Br. 23, wholly ignores the practical realities faced by many citizens in cross-border marriages and families. Indeed, in many cases that the government does not even acknowledge, the United States is the *only* possible country where certain married couples and families may reside together—which is frequently the reason that the citizen has filed an immediate-family petition for her spouse in the first place.

For example, the non-citizen spouse may reside in a country where U.S. citizens are not permitted to travel or to live permanently, as a matter of either U.S. or foreign law. In other cases, the U.S. citizen may be ineligible for a passport to travel abroad. *See, e.g.*, 22 C.F.R. § 51.60(a) (ineligibility based on child support obligations or default on a repatriation or medical assistance loan). And in yet other cases, the government may refuse to issue a passport through no fault of the citizen because the alien spouse resides in a country "where armed hostilities are in progress" or "there is imminent danger to the public health or physical safety of United States travelers." *Id.* § 51.63. Thus, preventing the couple from "liv[ing] in this country" together, Pet. Br. 24, may deprive it entirely of the right to "establish a home" and "bring up children" *anywhere*, *Meyer*, 262 U.S. at 399.

Moreover, U.S. citizens ordinarily have strong personal and family ties anchoring them to the United States and making relocation to another country impractical or even impossible. Many U.S. citizens

married to non-citizens have U.S. citizen children, parents, or other family members residing in this country for whom they are primary caregivers and whom they cannot abandon in order to move overseas.

This reality is particularly acute for U.S. citizens who have citizen children in this country. Such citizens who were previously married may be limited by divorce or custody decrees from relocating their citizen children outside of the United States. *See, e.g.*, Cal. Fam. Code § 3024.

Moreover, even in the absence of such legal restrictions, the government's proposed rule would force these citizens to make an unappealing choice. Indeed, these citizens would be compelled either to forego an American education and community for their citizen children in order to live abroad with their spouse, or to preserve these opportunities for their children on the condition of giving up the right to "establish a home" and "bring up children" with their spouse, *Meyer*, 262 U.S. at 399.

This choice is especially daunting for U.S. citizens, like Respondent Mrs. Din, whose spouses reside in undeveloped countries that offer severely limited educational, professional, and social opportunities for children, especially girls. *See, e.g.*, Trust In Education: Life As An Afghan Woman, *available at* http://www.trustineducation.org/resources/life-as-an-afghan-woman/ (last visited Jan. 13, 2015). Nothing in the Constitution or the INA permits the government to force U.S. citizens to this choice unfettered from the minimal safeguards of judicial review and an explanation of the reasons for denying a spouse an immediate-family visa.

3. The government offers no defensible legal position to justify these undeniable ill effects of its proposed rule. In fact, the government acknowledges that the "rights to marital privacy and to marry and raise a family" are "deeply rooted liberty interest[s] protected by the Due Process Clause." Pet. Br. 22. It nonetheless audaciously argues that its proposed rule does not "implicate[]" these fundamental "recognized rights." *Id.* This is so, according to the government, because its denial of a visa "did not interfere with respondent's ability to marry [the alien spouse]," "did not nullify the marriage, deprive the respondent of the legal benefits the marriage created, prevent her from living with her spouse anywhere in the world besides the United States," or foreclose her from "raising a family" on her own. *Id.* 22–23.

The government's construction of the fundamental right to marry is untenably narrow—and irreconcilable with the decisions of this Court. This Court has made painstakingly clear that the constitutional right to marry encompasses the rights to "*establish a home*" and "bring up children together," *Meyer*, 262 U.S. at 399 (emphasis added); *see also LaFleur*, 414 U.S. at 640; *Moore*, 431 U.S. at 499, 500–03 (plurality opinion), not merely to receive certain "legal benefits the marriage created" or to avoid "nullif[ication] of the marriage," Pet. Br. 23. The right to marry would be a hollow one indeed if the Constitution allowed a state to enact an anti-miscegenation statute that permitted inter-racial couples to marry and enjoy certain legal benefits, did not "nullify" such marriages, and allowed spouses in such marriages to "rais[e] a family" on their own, but prevented such couples from living together in the state. *Id.*; *cf. Loving*, 388 U.S. at 12.

The government's companion contention that the INA does not protect a U.S. citizen's obvious interest in "the alien [spouse's] visa application," Pet. Br. 19, fares no better. Indeed, the *only* reason for a spouse to file an immediate-family petition under the INA is to facilitate the alien's visa application, 8 U.S.C. § 1183a(a)(1)(B)—and the citizen ordinarily must execute the affidavit of support on behalf of the alien spouse *before* the government can even act upon the visa application. *Id.* § 1183a(a)–(c). Moreover, Congress recognized a citizen's interest in her spouse obtaining a visa and entering the United States when it established special procedures for immediate-family visas and exempted those visas from any numeric caps and other restrictions common to other forms of visas. *See id.* § 1151(b)(2)(A)(i).

The government's proposed stripping of basic rights held by U.S. citizens and their families thus lacks any persuasive legal basis, and would erode the crucial marital and family unity enshrined in the Constitution, federal immigration law, and American society. The Court should reject the government's fatally flawed position and affirm the decision of the Ninth Circuit.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

DETAILED STATEMENTS OF INTEREST OF AMICI CURIAE

National Justice For Our Neighbors was established by the United Methodist Committee On Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. The goal of Justice For Our Neighbors is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. Justice For Our Neighbors therefore serves the Methodist refugee ministry by addressing legal challenges faced by low-income immigrants in the United States, providing information and guidance to such immigrants, and fostering mutual understanding between immigrants and the larger communities in which they live.

Justice For Our Neighbors operates a network of legal clinics based in United Methodist churches throughout the country. It employs a small staff at its headquarters in Springfield, Virginia, which supports 16 Justice For Our Neighbors sites nationwide. Those 16 sites collectively employ more than 15 immigration attorneys, operate in 14 states and Washington, D.C., and include approximately 40 clinics that operate out of United Methodist Churches. Justice For Our Neighbors serves more than 4,000 low-income clients a year.

Justice For Our Neighbors therefore has well-developed expertise in the area of immigration law and a keen interest in the fair and equitable interpretation and implementation of laws touching on immi-

grant rights. As a Christian ministry, Justice For Our Neighbors is also firmly committed to marital and family unity. Indeed, Methodists "affirm the sanctity of the marriage covenant that is expressed in love, mutual support, personal commitment, and shared fidelity." United Methodist Church, Social Principles & Creed: The Nurturing Community, *available at* http://www.umc.org/what-we-believe/the-nurturing-community (last visited Jan. 13, 2015). Methodists "believe the family to be the basic human community through which persons are nurtured and sustained in mutual love, responsibility, respect, and fidelity." *Id.* Methodists also "affirm the importance of loving parents for all children" and "encourage social, economic, and religious efforts to maintain and strengthen relationships within families in order that every member may be assisted toward complete personhood." *Id.* Justice For Our Neighbors therefore advocates interpretations of the federal immigration laws that preserve marital and family unity, to the benefit of families, communities, and society at large.

Refugee And Immigration Ministries, Christian Church (Disciples Of Christ) is a Home Missions Ministry of the Christian Church (Disciples of Christ). Since 1949, the Christian Church (Disciples of Christ) has resettled more than 37,500 refugees and assisted countless people facing immigration problems. Refugees and Immigration Ministries responds to the needs of refugees and immigrants throughout the world, speaks out against anti-immigrant attitudes, advocates for the rights of refugees and immigrants and for immigration reform, and offers legal and other services to individuals and families attempting to navigate the immigration system.

The Council on American-Islamic Relations ("CAIR") is the largest American Muslim civil rights organization in the country, with chapters nationwide. CAIR's civil rights department, headquartered in its national office in Washington, D.C., is dedicated to protecting the civil rights and liberties of all Americans. In addition to its civil liberties litigation activities defending constitutional rights, CAIR also engages in public advocacy to promote a greater understanding of Islam among the American public and policymakers and to encourage participation by and integration of American Muslims in political and civic life.

CAIR is active in the federal courts, including involvement in suits seeking protection of privacy rights from overly broad and invasive governmental surveillance, due process for those unjustly ensnared in the government's watchlist net, redress for employment discrimination and accommodation of religious needs.

CAIR is concerned with the impact of immigration rules on those seeking to immigrate to the United States from Muslim-majority countries. As this case makes evident, there is the potential for consular officials to cite vague and factually unjustified "national security" grounds for rejecting such immigrants. Given this potential, it is especially disturbing that such consular decisions could be made without adequate due process rights for the applicant to challenge the factual basis purportedly underpinning them. These concerns are heightened by the drastic impact such decisions can have on the fundamental constitutional right of American citizens to marry and establish a family life together as they choose.

Mennonite Central Committee ("MCC"), a worldwide ministry of Anabaptist churches, shares God's love and compassion for all in the name of Christ by responding to basic human needs and working for peace and justice. MCC envisions communities worldwide in right relationship with God, one another and creation.

MCC walks with immigrants around the world in a variety of ways, including by addressing the root causes of migration and by supporting refugees and internally displaced people. MCC works with immigrants in the United States by providing documentation services in several locations to help immigrants navigate the complex immigration system; working to build peace in communities along the U.S.-Mexico border; advocating to federal policymakers for sensible, humane immigration policies and encouraging church members to do the same; and speaking in churches and creating educational resources.

UNITED SIKHS is an international, UN-affiliated, civil and human rights advocacy organization with over eleven chapters worldwide that pursue projects for the spiritual, social and economic empowerment of underprivileged and minority communities. UNITED SIKHS seeks to foster active participation in society by underprivileged communities and individuals, including engaging in cross-cultural, multi-faith, and social dialogues.

UNITED SIKHS is interested in the Court's ruling in this case because, as an organization representing the well-being and interests of Sikhs and other minority groups in the United States, we believe in keeping families together as a basic atomic structure and essential social unit. Family unity ensures the

existence and continuation of healthy communities and societies. UNITED SIKHS humbly requests that the Court construe the federal immigration laws to uphold the fundamental right for married couples and families to establish homes and live together.

Franciscan Action Network (FAN) was initiated in 2007 by Franciscan leaders to create a unified Franciscan voice for justice, peace, and care for creation. FAN includes fifty institutional members who represent thousands of Franciscans and Franciscan hearted people across the country, primarily but not solely Catholic. Since its inception, FAN has given high priority to immigration issues, with many members engaged in direct service with immigrants and/or advocacy on behalf of immigrant families. In this work, FAN collaborates with the Interfaith Immigration Coalition (IIC) and the Justice for Immigrants Campaign of the U.S. Catholic Bishops. With these organizations, FAN promotes family unity in U.S. policy and programs.

The **Office of Social Justice** (OSJ) is a ministry of the Christian Reformed Church (CRC) that responds to God's call to let justice flow like a river in our personal and communal lives. Social justice ministry in the CRC developed in response to world hunger reports adopted by the denomination in 1979 and 1993, and the OSJ was established in 2000. The OSJ's mission is to educate CRC members, encourage and support their engagement in social justice issues, and occasionally to become involved in direct advocacy.

One of the main issues that the OSJ focuses on is immigration and the need for immigration reform. In the United States, the OSJ is advocating, as partners

with the Evangelical Immigration Table, for a bipartisan solution to immigration that respects the God-given dignity of every person, protects the unity of the immediate family, and that establishes a path toward legal status and/or citizenship for those who qualify and who wish to become permanent residents. Beyond the policy principles, the OSJ longs for the day when churches and communities exhibit a fuller embrace of our call to welcome the stranger. The OSJ provides educational and advocacy tools for individuals and congregations to learn more about immigration.

For over two decades, the **Council Of Islamic Organizations Of Greater Chicago** ("CIOGC") has served as the unifying force that brings together over 400,000 Muslim Americans in the greater Chicago region, and now increasingly all of Illinois. CIOGC brings this extraordinary and diverse community together in cooperation and collaboration to engage and work with the interfaith community, government, media, and the public in general. CIOGC not only builds and nurtures unity within the Muslim-American community, but also works in coalitions and partnerships with other community-based and interfaith groups on issues of common concern. These partnerships have involved advocacy efforts aimed at immigration reform and at protecting the civil rights of immigrants.

CIOGC also has a strong interest in preserving marital and family unity. Islam regards marriage and family as noble, sacred, and divinely ordained institutions. Islam views the family as the foundation of society that is essential for the spiritual growth of its members and a harmonious and just so-

cial order. CIOGC therefore supports strengthening and preserving families, including immigrant families, as the cornerstones of local communities and society at large.